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THE

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INCLUDING

Bankruptcy and Lunacy Cases,

BEFORE

THE LORD CHANCELLOR,

AND THE

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EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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ERRATA.

[The sign — prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

Page	*Line*	*For*	*Read*
635	—1	this decision was reversed	it was held.
636	1	after "Bankruptcy" insert	"that the magistrates were entitled "to the £2433 5*s.* 2*d.* and the "£362 13*s.* 10*d.*"
652	—7	after "letter" insert	"which he took."
"	"	after "cheque" insert	"obtained from Barnard."
784	foot note (7)	25 Beav. 526	25 Beav. 556.

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GENERAL RULES

1871

MADE IN PURSUANCE OF

THE BANKRUPTCY ACT, 1869,

32 & 33 VICT. c. 71.

GENERAL RULE.

IT IS ORDERED as follows, that is to say:—

1. The general rules in bankruptcy made on the 1st day of January, 1870, may be cited for all purposes as "The Bankruptcy Rules, 1870," and these rules as "The Bankruptcy Rules, 1871," and such rules shall be read and construed together.

Receiver.

2. Where a Receiver or Manager of the property or business of a bankrupt shall have been appointed, he shall, upon the appointment of a Trustee, deliver to such Trustee all money and property which may have come to his hands, unless the Court shall otherwise order.

3. A Receiver or Manager, in cases either of bankruptcy or liquidation, shall not have any lien whatever for his remuneration on any money or property which may have come into his hands.

Costs.

4. All bills and charges of attorneys, receivers, managers, accountants, auctioneers, brokers, and other persons not being trustees, in matters of bankruptcy, shall be taxed by the proper officer of the Court, and no payments in respect of such bills

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or charges shall be allowed by the Comptroller, in the accounts of a Trustee, without due proof of such taxation having been made. The taxing officer shall satisfy himself that the employment of a solicitor has been duly authorized by section 29 of the Act.(g)

5. All bills and charges of attorneys, receivers, managers, accountants, auctioneers, brokers, and other persons not being trustees, in matters of liquidation, shall be taxed by the proper officer of the Court, and no payments in respect of such bills or charges shall be allowed in the accounts of a Trustee without due proof of such taxation having been made. No payment shall be allowed in respect of the remuneration of a Trustee in liquidation, except on the allocatur of the taxing officer, as being in accordance with the determination of the creditors thereon.(g)

6. Where in bankruptcy or liquidation a Receiver or Manager is continued as Trustee, the remuneration of Trustee at the rate determined on shall commence as from the date of his appointment as Receiver or Manager, and shall be assessed accordingly; and no other than the aforesaid remuneration shall be made to the Trustee for his services as Receiver or Manager.

7. Where the Receiver or Manager is not continued as Trustee, or is continued as Trustee but without remuneration, he shall be allowed out of the estate such sum for his services as Receiver or Manager as the taxing officer of the Court shall, having regard to the views of the Trustee, and Committee of Inspection (if any) thereon, think fit.(h)

8. Where any costs in bankruptcy or liquidation are incurred subsequent to these rules, and the proveable debts of the debtor do not exceed £750, or the estimated assets do not exceed £200, a lower scale of attorneys' costs shall be allowed, namely, three-fifths of the charges ordinarily allowed, disbursements being added. If in error any charges have been allowed or paid on the higher scale, and the proveable debts shall afterwards be ascertained not to exceed £750, or the gross proceeds of the assets not to exceed £200, the excess shall be disallowed, and if paid shall be repaid to the Trustee.(i)(j)

(g) Ex parte Hodges, Re Lennon, 11 R.C.R.

(h) Ex parte Re Lyons, 16 L.T. 694.

Ex parte Pearce

Accounts. 1871

9. Where the Comptroller in Bankruptcy shall report to a County Court the failure of a Trustee to comply with any requisition which may have been made on him by the Comptroller under the provisions of section 57 of the Act, the Registrar of the Court shall appoint a day for the Trustee to attend the Court, four days notice whereof, according to the form in the schedule, shall be sent by post or otherwise by the Registrar to the Trustee, together with a copy of the Comptroller's report, which copy shall be forwarded by the Comptroller to the Court with the original report.

10. Where a Registrar of a County Court having jurisdiction in Bankruptcy acts as a Trustee, the word "Court" in sub-section 17 of section 83 shall mean the Judge of such Court, and shall not include the Registrar acting as Judge under powers delegated by the Judge.

11. The Registrars shall in all cases of bankruptcy forward to the Comptroller an office copy of the minutes of proceedings at first meeting of creditors, a memorandum of order of discharge, and of order annulling adjudication, or of closing bankruptcy, and shall supply the Comptroller with such special information, or statistical returns, as he may from time to time require.

12. Where a Receiver or Manager has been appointed in a bankruptcy, the accounts of such Receiver or Manager shall be forwarded to the Comptroller in Bankruptcy by the Trustee, with the first accounts rendered by him to the Comptroller.

13. The estate book referred to in Rule 243 of "The Bankruptcy Rules, 1870," may be kept in the form of an ordinary debtor and creditor account in lieu of the form prescribed by such rule.

14. The Trustee shall submit to the Committee of Inspection his bank pass book at the quarterly meeting required to be held by section 20 of the Act, and shall forward to the Comptroller a copy duly certified by the committee of all entries made therein since the previous audit.

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15. Where the Trustee has not since the date of his appointment, or since the last audit of his accounts, received or paid any sum of money on account of the bankrupt's estate, he shall at the Quarterly Meeting required by section 20 lay before the Committee of Inspection a statement to that effect, according to the form in the schedule; and such statement shall, if approved, be signed by the Committee, and forthwith forwarded by the Trustee to the Comptroller.

16. Where there is no Committee of Inspection, and the Trustee has not for a period of three months from the date of his appointment or from the last audit of his accounts, received or paid any sum of money on account of the bankrupt's estate, he shall file with the Registrar of the Court an affidavit to that effect according to the form in the schedule, and shall forthwith forward an office copy of such affidavit to the Comptroller. Where the Registrar is Trustee he shall forward to the Comptroller a certificate to the like effect.

17. Upon the declaration of a dividend a Trustee shall send to the Comptroller a list of creditors who have proved, shewing the amount of proofs and dividends.

18. At the expiration of twelve months from the declaration of such dividend, or if the bankruptcy be closed within twelve months of such declaration then at the close of the bankruptcy, the Trustee shall forward to the Comptroller a list of the dividends unclaimed, together with vouchers shewing the payment of such dividends as have been paid.

19. Upon the receipt of such list the Comptroller shall send to the Trustee an order by the Accountant in Bankruptcy upon the Bank of England to receive the amount of the dividends which remain unclaimed, and the Trustee shall within one week from the date of such order pay into the Bank of England the sum mentioned in such order.

20. Any other moneys arising from the property of the bankrupt remaining under the control of the Trustee at the close of the bankruptcy of any bankrupt, shall, in like manner, be paid by the Trustee into the Bank of England.

21. All moneys received by a Registrar acting as Trustee after the close of a bankruptcy, shall in like manner be paid by him into the Bank of England within one month of the receipt of the same. 1871

22. The Governor and Company of the Bank of England shall receive and carry to the credit of the account of the Accountant in Bankruptcy, all moneys so directed to be received by any order of the Accountant.

23. Subject to the provisions of section 116 of "The Bankruptcy Act, 1869," and section 19 of "The Bankruptcy Repeal and Insolvent Court Act, 1869," the Court, upon being satisfied that any person who may claim to be entitled to any dividend or other payment from moneys which shall have been so paid into the Bank of England is entitled thereto, may order payment of the same according to the form in the schedule.

24. Where payment is required to be made to a Registrar of a County Court for the fees authorized to be taken by him for the duties of realizing the estate and of making a dividend, the order directing such payment shall be signed by the Judge of the Court, and any order made by the London Bankruptcy Court for the payment of such fees shall be made payable to such officer as may be authorized to receive fees on behalf of Her Majesty's Exchequer.

25. Every Registrar acting as a Trustee after the close of a bankruptcy shall, within ten days after the 30th June and 31st December, forward to the Comptroller a certificate to the effect that he has paid into the Bank of England all sums of money received by him on account of closed estates.

26. Every Registrar acting as a Trustee after the close of a bankruptcy shall, within twenty days of the 30th June in every year, forward to the Accountant in Bankruptcy an account shewing the balance standing to the credit of each closed estate in which he is trustee, which account, if correct, shall be certified by the Accountant and returned by him to the Registrar.

27. Where any money shall be paid into the Bank of England

1871 pursuant to these rules, the Trustee shall receive a certificate from one of the cashiers of such bank.

Disclaimer of Leasehold Interest.

28. Where any property of a bankrupt acquired by a Trustee under "The Bankruptcy Act, 1869," shall consist of a leasehold interest, the Trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose; and upon any application to the Court for such leave, notice of the desire of the Trustee to disclaim such interest shall be given to such person or persons as the Court shall direct, and such order shall be made thereon as the Court shall think fit.

HATHERLEY, C.
JAMES BACON, Chief Judge.

7 *July* 1871.

SCHEDULE OF FORMS.

1. *Notice to Trustee at instance of Comptroller.*

THE BANKRUPTCY ACT, 1869.

IN the County Court of , holden at .

Sect. 57. In the matter of A. B., of , a bankrupt.

Take notice that you are required to attend at this Court on the day of , at o'clock in the - noon, to explain why you have failed to comply with the requisition of the Comptroller in Bankruptcy, mentioned in a report of that Officer to this Court, a copy of which is hereto annexed.

Take further notice that, should you not attend on that day, the Court will, in your absence, make such order in the premises as it may think just.

Dated this day of 187 .

Registrar.

2. *Order of Discharge.*

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THE BANKRUPTCY ACT, 1869.

In the London Bankruptcy Court [*or* the County Court of , holden at].

In the matter of *A. B.*, of , a bankrupt.

An order of discharge was this day granted to *A. B.*, of ; who was adjudicated bankrupt on the day of 187 . Rule 139, 1870.

Dated this day of 187 .

Registrar.

3. *Notice in Gazette of Dividend declared.*

In the London Bankruptcy Court [*or* the County Court of , holden at].

A dividend of shillings in the pound has been declared in the matter of *A. B*, of , adjudicated bankrupt on the day of , and will be paid by me at [*here set out fully the place where the dividend will be paid*] on and after the day of , 187 . Rule 132, 1870.

Dated this day of .

Trustee.

4. *Form of Affidavit on Nomination of Receiver by Creditors.*

THE BANKRUPTCY ACT, 1869.

In the London Court of Bankruptcy [*or* in the County Court of , holden at].

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by *A. B.*, of, &c.

I, , of , make oath and say as follows:— Rule 202, 1870.

1. I am [*or* a partner in the firm of , which firm is] one of the three principal creditors of the above-named *A. B.*, who have nominated *C. D.* as Receiver [*or* Manager] of the property [and business] of the said *A. B.*

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2. I verily believe the said *C. D.* has been duly nominated as such Receiver [*or* Manager] by a majority in value of the creditors of the said *A. B.*, in pursuance of Rule 262 of the Bankruptcy Rules, 1870.

Sworn, &c.

Order for Payment, No.

Re:
Adjudication dated

5. *Order for Payment of Moneys out of Bank of England.*

No.

THE BANKRUPTCY ACT, 1869.

In the London Bankruptcy Court [*or* the County Court of , holden at], day of 18 .

In the matter of , a bankrupt.
(Under Adjudication dated 18 .)

It appearing to the Court that is entitled to be paid the sum of pounds shillings and pence, being , and that the said sum forms part of the moneys standing to the credit of the account of the Accountant in Bankruptcy in the Bank of England, it is ordered that the said sum be paid to .

By the Court.

£ (L.S.) Registrar.

To the Accountant in Bankruptcy.

Order for Payment. In pursuance of the above Order pay to or order the sum of pounds shillings and pence.

£

£ „ „

Accountant.

To the Cashier of the Bank of England.

N.B.—*This Order, upon being properly endorsed, will be paid at the Public Drawing Office, Bank of England, any day until three o'clock.*

6. *Certificate of no Receipts or Payments by Trustee.* 1871

THE BANKRUPTCY ACT, 1869.

In the London Bankruptcy Court [*or* the County Court of , holden at].

In the matter of , of , a bankrupt.

I , of , the Trustee of the property of the above-named bankrupt, certify that since as Trustee I have not, nor has any person, by my order or for my use, received or paid any sum of money on account of the bankrupt's estate.

"the date of my appointment" *or* "the last audit of my accounts," *as the case may be.*

And I further certify that the reason why I have not received any sum of money on account of the said estate since the time aforesaid, is [*here state reason*].

Reason to be shortly stated.

Examined and approved this day of 18 .

Trustee.

} Committee of Inspection.

7. *Affidavit of no Receipts or Payments by Trustee in Cases where there is no Committee of Inspection.*

THE BANKRUPTCY ACT, 1869.

In the London Bankruptcy Court [*or* the County Court of holden at].

In the matter of , of , a bankrupt.

I, , of , the Trustee of the property of the above-named bankrupt, make oath and say,

1. That since as Trustee I have not, nor has any person, by my order or for my use, received or paid any sum of money on account of the bankrupt's estate.

"the date of my appointment" *or* "the last audit of my accounts," *as the case may be.*

2. That the reason why I have not received any sum of money on account of the said estate since the time aforesaid is [*here state reason*].

Reason to be shortly stated.

Sworn at, &c.

1871

Scale of Attorneys' Costs of Proceedings for Liquidation by Arrangement, under Section 125, up to Appointment of Trustee.

(The taxing officer will exercise a fair discretion as to the allowance of preliminary or other charges connected with the debtor's failure and any steps taken to protect the estate for the general benefit of creditors, subject to order of Court or resolution of creditors.)

	£	s.	d.
Instructions for petition	1	0	0
Attending searching if bankruptcy petition filed	0	6	8
Paid search	0	1	0
Drawing and engrossing petition	0	10	0
Paid stamp and parchment	1	1	0
Attesting signature of (each) petitioner	0	6	8
Drawing and fair copy affidavit verifying petition	0	3	4
Attending petitioner to be sworn	0	6	8
Paid oath and exhibit on petition where necessary	0	2	6
Paid stamp	0	1	0
Attending petitioner as to the nature of his liabilities and as to addresses of his creditors, and preparing certificate as to place of meeting	0	6	8
Attending Court on presentation of petition, and filing same and affidavit	1	0	0
If by agent £2 0 0			
[*In special cases attorney's journey may be charged where resident at a distance from the Court.*]			
Paid for file for proceedings			
Drawing notice to creditors of first general meeting and copies thereof			
(*2s. 6d. each for the first* 20, *and* 1*s. each afterwards, and* 3*d. each, throughout, for forms and printing.*)			
Paid postage stamps			
Drawing request to registrar to send notices and list of creditors to annex at 1*s.* per folio			
Fair copy (per folio 4*d.*)			
Paid stamps at 3*d.* per notice			
Attending with request and list of creditors and lodging notice, and going through and checking same with Registrar (*in discretion of taxing officer according to length of list*)			
Drawing and two fair copies notice of general meeting for Gazette	0	6	

	£	s.	d.	1871
Attending obtaining signature of Registrar and seal thereto	0	3	4	
Attending inserting in Gazette	0	6	8	
Paid insertion				
Attending for copy Gazette and attending filing . .	0	3	4	
Paid for copy Gazette (*cost of same*)				

[*Where statement of affairs prepared by attorney, charge to be allowed for instructions and attendances on debtor and drawing statement at* 1*s. per folio, and fair copy thereof at* 4*d., and attendances on debtor and obtaining his signature thereto; if prepared by an accountant, perusing and considering statement and attendances on debtor and accountant thereon.*]

Attending meeting, self and clerk	1	5	0	
If by agent £2 5 0				

[*A double or longer sitting will only be allowed where certified for by the chairman, and approved by the taxing officer. In special cases attorney's journey may be charged where resident at a distance from the place of meeting.*]

Fee for examining and exhibiting proofs, comparing and completing resolutions with proxies, &c., and (*where necessary*) obtaining signatures of creditors subsequently to the meeting. *Rule* 275 of 1870 . . . .

[*Where any special circumstances, drawing resolutions or deed for carrying same into effect, and fees to counsel to settle may be allowed.*]

Drawing and fair copy affidavit, verifying resolutions, statement, proofs, and proxies produced at meeting, and of appointment of chairman	0	6	8	
Attending swearing	0	6	8	
Paid oath (where necessary) and stamp	0	2	6	
Drawing affidavit as to value of assets	0	6	8	
Attending swearing	0	6	8	
Paid oath (where necessary) and stamp	0	2	6	
Attending Registrar on application to register special resolution	1	5		
If by agent £2 5 0				
Paid *ad valorem* stamp duty on resolution . . .				

[*In country cases* Paid for office copy resolutions to be sent to London Court.]

1871

	£	*s.*	*d.*
Drawing and two fair copies certificate of trustee's appointment	0	6	8
Attending obtaining Registrar's signature and seal of the Court thereto	0	6	8

Where Resolutions objected to.

Attending obtaining appointment for registration	0	6	8
Drawing notice of intention to register and fair copy	0	5	0
Copy and service of notice (*each*)	0	5	0
Drawing affidavit of service and copy notice to annex	0	6	8
Paid oath and stamp	0	2	6
Attending swearing affidavit and filing	0	6	8
Attending Registrar on hearing of application and drawing order	0	13	4

[*Any additional charges to be certified by Registrar at time of hearing application.*]

Where Receiver appointed.

Instructions for application for appointment of receiver	0	6	8
Drawing and fair copy application	0	5	0
Stamp thereon	0	5	0
Drawing affidavit in support of application	0	6	8
Attending swearing	0	6	8
Paid oath and stamp	0	2	6
Drawing affidavit of responsibility	0	6	8
Attending swearing	0	6	8
Paid oath and stamp	0	2	6
Attending Court on application, order made	0	13	4

[*The attendance of counsel is not to be allowed unless sanctioned by the Court at the time of application for Receiver.*]

Drawing order, and two fair copies, and obtaining Registrar's signature, and passing	0	6	8

Where Interim Injunction necessary pending full notice of Motion for Injunction.

Instructions for application to restrain pending proceedings	0	6	8
Drawing and fair copy application	0	5	0
Paid stamp	0	5	0
Drawing affidavit in support of application and copy			

	£	*s.*	*d.*	1871
Attending swearing	0	6	8	
Paid oath and stamp	0	2	6	

[*The attendance of counsel is not to be allowed unless sanctioned by the Court at the time of application for Interim Injunction.*]

Attending Court on application order made	0	13	4	
Drawing and engrossing order and passing	0	6	8	
Notice of injunction, copy and service (*each*)	0	5	0	

[*Where possible the application for Receiver and Interim Injunction to be made at one and the same sitting, and the costs to be allowed by the Taxing Officer accordingly.*]

Injunctions.

Instructions for notice of motion for (*or to continue*) injunction	0	6	8	
Drawing same, 1*s.* per folio				
Fair copies (4*d.* per folio)				
Drawing affidavit and copy				
Attending swearing	0	6	8	
Paid oath and stamp	0	2	6	
Copies affidavits to accompany notice, 4*d.* per folio				
Service of notice and copies affidavits (*each service*)	0	5	0	

[*Costs of Brief.—See scale of costs under "The Bankruptcy Rules*, 1870."]

Attending Court on application for (*or for continuance of*) injunction	0	13	4	
Drawing order, 1*s.* per folio				
Fair copy, 4*d.* per folio				
Attending passing	0	6	8	
Paid for office copies				
Service of order (*each service*)	0	5	0	

[*Where more than one injunction (interim or absolute) is applied for or granted, the Taxing Officer is to exercise discretion whether more than one set of costs is to be allowed. Separate applications are not to be made unnecessarily. Where the proceedings restrained relate to a claim not exceeding* £20, *charges are to be allowed on the lower scale in respect of the injunction, notwithstanding that the debts exceed* £750 *or the assets* £200.—*See Rule* 8 *of* 1871.]

1871

Where Appointment of Trustee advertised.

	£	*s.*	*d.*
Drawing advertisement of appointment of trustee and copy	0	6	8
Attending obtaining Registrar's signature and seal thereto	0	6	8
Attending to insert in Gazette and daily paper . .	0	6	8
Paid			
Attending for copies, papers, and filing advertisements with Registrar	0	6	8
Paid			

Debtor's Discharge (where granted).

Drawing report of trustee to Registrar and engrossing .	0	10	0
Attending obtaining trustee's signature	0	6	8
Attending filing and obtaining Registrar's certificate thereto	0	6	8

As to matters not specifically provided for and subsequent to the appointment of a Trustee, the Taxing Officer will be guided by the Scale of Attorneys' Costs under "The Bankruptcy Rules, 1870," *and the general practice in Bankruptcy.*

HATHERLEY, C.
JAMES BACON, Chief Judge.

7 *July* 1871.

ORDER REGULATING FEES 1871

TO BE TAKEN UNDER

THE BANKRUPTCY ACT, 1869.

I, The Right Honourable William Page Baron Hatherley, Lord High Chancellor of Great Britain, do, by virtue of the powers vested in me by the Bankruptcy Act, 1869, prescribe that the scale of fees hereto annexed shall be the scale of fees to be charged for any business done by any Court or officer under the said Act in lieu of all other fees.

Hatherley, C.

SCALE OF FEES.

Table A.

	Stamp Duty. £	s.	d.
Every declaration by a debtor of inability to pay his debts	0	5	0
Every debtor's summons	0	5	0
Every bankruptcy petition	5	0	0
Every bond with sureties	0	5	0
Every affidavit filed, other than proof of debts . .	0	1	0
Every subpœna	0	1	0
Every petition under sections 125 or 126 of the Act .	1	0	0
For despatching notice to creditors or others, exclusive of postage, each notice	0	0	3
Every application for an order of discharge in bankruptcy or certificate of discharge in liquidation . . .	1	0	0

1871		Stamp Duty. £	s.	d.
	Every special resolution presented to a registrar for registration under section 125, paragraph 4, stamps denoting a duty computed at the rate of five shillings upon £100 or fraction of £100 on the gross amount of the estimated assets, not exceeding a total duty of £200.	—		
	Every extraordinary resolution presented to a registrar under section 126, stamps denoting a duty computed at the rate of five shillings upon £100 or fraction of £100 on the gross amount of the composition, not exceeding a total duty of £200.	—		
	Every application for search for proceedings, other than by petitioner, trustee, or bankrupt	0	1	0
	Every application to a Court	0	5	0
	Every office copy, each folio of 72 words . . .	0	0	2
	On first certified statement shewing assets realized, forwarded by a trustee to the comptroller under section 55 of the Act, stamps denoting a duty computed at the rate of five shillings upon £100 or fraction of £100 on the gross amount of the assets realized and brought to credit; and on any subsequent statement, stamps denoting a duty computed at the rate of one shilling upon £20 or any fraction of £20 on the gross amount of additional assets realized and brought to credit in any such subsequent statement.	—		
	On every record of trial . . . . . or such less sum as the Court may specially order.	5	0	0
	Every allocatur by any officer of the Court for any costs, charges, or disbursements, where such bill of costs shall not exceed £5	0	1	6
	Exceeding £5 and not exceeding £10 . . .	0	2	6
	„ 10 „ 20 . . .	0	5	0
	„ 20 „ 30 . . .	0	7	6
	„ 30 „ 50 . . .	0	10	0
	„ 50 „ 100 . . .	0	15	0
	„ 100 „ 150 . . .	1	0	0
	„ 150 „ 200 . . .	1	10	0
	„ 200 „ 300 . . .	2	0	0
	„ 300 „ 500 . . .	3	0	0
	„ 500 „ — . . .	5	0	0

Duty is payable on amt recd for principal in full of creds. in pltn Thurnay de Forrest 32 Reg 245 C/B

Duty is pble on amt got what debtor in liquidation values his effect. de Burgh 32 Reg 628 C/B.

TABLE B. 1871

	£	s.	d.
Attending Court each sitting.	0	2	0
Serving every debtor's summons, bankruptcy petition, subpœna, order, notice, or other process within two miles, including affidavit of service	0	3	6
Preparing advertisement for Gazette or local paper . .	0	3	6
Agents' charge for insertion in Gazette	0	1	0
Executing every warrant of seizure, or search warrant, or warrant of apprehension, or order of commitment, within two miles of Court House	0	10	0
Keeping possession—for each day the man is actually in possession; including affidavit of possession being actually kept . . . . . (3s. 6d. of the above sum is to be paid to the man in possession, and his receipt produced.)	0	4	6
High Bailiff's, or, in the London Bankruptcy Court, officer's man travelling to place of possession, or to execute a warrant of or order of commitment, or to serve a summons, petition, order, notice, subpœna, or other process, or for any other purpose specially directed by the Court, per mile	0	0	5
His time, per day, where distance exceeds 10 miles . .	0	4	6
His expenses, per day „ „ . .	0	4	6
If High Bailiff of a County Court or officer of London Bankruptcy Court directed by the Court personally to travel, per mile	0	0	7
If High Bailiff of a County Court or officer of London Bankruptcy Court directed by the Court personally to travel, his time, per day	0	10	0
If High Bailiff of a County Court or officer of London Bankruptcy Court directed by the Court personally to travel, his expenses, per day	0	10	0

Where an inventory is deemed requisite, and is directed by the Court or trustee to be taken by a High Bailiff or officer of the Court, a proper remuneration may be allowed for taking it, having regard to the time occupied and the nature of the property included in it.

Where no trustee is appointed by the creditors, or where there is a vacancy in the office of trustee, and the bankruptcy is carried on with the aid of the Registrar as trustee: for realization of the estate £5 per cent. on the first amount of £100 or any less sum realized by the Registrar; $2\frac{1}{2}$ per cent. on the next amount of £400 or any less sum;

1871 1 per cent. on the next amount of £500 or any less sum; and ½ per cent. on all further sums.

On dividend £2 per cent. on the first amount of £1000 or any less sum actually divided, and 1 per cent. on all further sums.

TABLE C.

The fees and allowances payable on proceedings had after the 31st day of December, 1869, in respect of any matter which was pending in any Court having jurisdiction in bankruptcy on the said day shall be the same as if those proceedings had been taken before such day, and shall be applied to the same purposes.

We, the undersigned Lords Commissioners of Her Majesty's Treasury, do hereby sanction the foregoing scale of fees, and do direct that the fees to be taken by stamps shall be those mentioned in Table A., and that the fees mentioned in Table B. shall be taken in money, and that the fees and allowances referred to in Table C, shall be taken by stamps or money according as they have hitherto been taken.

And we further direct that the stamp shall be affixed or the money paid in respect of every fee before the proceeding is had in respect of which the fee is payable, and that the charge to be made by the London Gazette for the insertion of each notice authorized by the Act or Rules shall be ten shillings.

W. P. ADAM.
W. H. GLADSTONE.

10*th August*, 1871.

Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

DENNY *v.* HANCOCK.

L. JJ.
1870
Nov. 9, 10.

Vendor and Purchaser—Misdescription—Mistake—Question of Title or Conveyance.

On a sale of a small residential property the plan exhibited shewed the western side as bounded by a strip of ground covered with a mass of shrubs or trees. An intending purchaser went with the plan in his hand, inspected the property, found on the western side a belt of shrubs bounded on the west by an iron fence, and including three magnificent trees. He then bid for the property, believing that he was buying everything up to the fence. He afterwards discovered that the three trees and the iron fence stood on the glebe land which adjoined this property, the real boundary being denoted by stumps, which were so shrouded by the shrubs as not easily to be seen. The plan represented in a conspicuous way all the detached trees standing on the property, none of which were nearly so large as the trees in question, but did not shew these trees. It was admitted that the existence of these trees was a material element in the value of the property as a residence:—

Held (reversing the decision of *Malins*, V.C.), that the purchaser inspecting the property with the plan in his hand would naturally conclude the iron fence to be the boundary; that there was nothing to put him on inquiry whether it was not; that he had been misled by the fault of the vendors; and that specific performance could not be decreed against him:

Per Mellish, L.J.:—In such a case the difference between the apparent and true boundaries ought not only to have been shewn on the plan, but also mentioned in the particulars:

Held, further, that whether the purchaser's motive for resisting specific performance was that he objected to having the property without the trees,

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or that for some other totally distinct reason he wished to escape from his bargain, was a question with which the Court had no concern:

Per James, L J.:—If a purchaser insists on a requisition on a matter of conveyance with which the vendor refuses to comply, and the purchaser rescinds the contract, whether, if the Court holds the purchaser to have been right in his contention, a decree will be made for specific performance at the suit of the vendor—*quære*.

THIS was an appeal by a purchaser from a decree for specific performance made by Vice-Chancellor *Malins* at the suit of the vendors, who were trustees for sale and executors under the will of *G. Denny*.

The property was a freehold house and grounds suited for a gentleman's residence, and described in the particulars as comprising "about two acres and three-quarters." The 8th condition was: "The quantity stated in the particulars shall be assumed to be correct, the same being taken from a recent survey of the property, and no objection is to be made on the ground of any discrepancy between such quantity and any of the quantities stated in the abstract, and misdescription in any other respect shall not annul the sale, but a compensation for such misdescription shall be given or taken, as the case may require, such compensation to be settled by, &c."

Annexed to the particulars was a plan of the property. The ground may, with sufficient accuracy for the present purpose, be described as triangular, the house being at the north-west corner, the front looking in a north-easterly direction across a road, and the back in nearly a south-west direction upon a lawn and meadow. The western boundary was marked by a distinct straight line, and a footpath in the grounds was delineated as running parallel to it along its whole length, the intervening space, shewn upon the plan as about ten feet wide, being filled up with a rough delineation of small trees or shrubs so as to represent a shrubbery, without any indication of there being any very large trees there. In the meadow, which formed the south-westerly part of the property, four separate trees were drawn in a way directing attention to them as prominent objects, and in one of the two kitchen-gardens twelve separate trees were drawn, and six in the other.

The Defendant, on the 29th of April, 1868, became the purchaser by auction for £3800. On the 2nd of May the abstract was

delivered. On the 11th of May requisitions were sent in, which were answered on the 15th. On the 18th of June the draft conveyance was sent with some further requisitions. Answers were sent to these requisitions on the 22nd, and the draft was returned approved on the 24th. After this a will, the production of a copy of which was called for by one of the requisitions, was inspected, and counsel's opinion taken upon it. The result was, that on the 3rd of July, 1868, the purchaser took the objection that the vendors were not competent to give a receipt for a sum of £2800 due on mortgage of the property, and forming part of the estate of Miss *Bell*. It appeared that the testator, who was the surviving trustee and executor of Miss *Bell's* will, had invested £2800, part of her personal estate, on securities which were considered improper, had taken to them himself, and, in order to secure the money to her estate had executed a mortgage of the property now in question to a Mr. *W. E. Denny* for £2800. The vendors contended that they, being the personal representatives of Miss *Bell*, could give a discharge for this sum, but the purchaser insisted that new trustees of her will must be appointed before an effectual discharge could be given. After some correspondence the purchaser's solicitor, on the 20th of July, wrote to the solicitor of the vendors, stating that for reasons which he would give he was advised that the purchaser was in a position to rescind, but that before acting on this the two solicitors had better meet. An interview accordingly took place, when the purchaser's solicitor stated objections which the vendors' solicitor treated as untenable, and pressed for completion of the purchase. On the 6th of August, in reply to a letter from the vendors' solicitor, the purchaser's solicitor wrote him a letter adverting to the question as to the £2800, and to the circumstance that the purchaser had been misled as to the three trees, which will presently be mentioned, stating that it was a question whether the purchaser was not entitled to be relieved from his bargain on the ground of misrepresentation, but offering to give £200 to be released from it. The vendors refusing these terms, the Defendant's solicitor, on the 14th of August, gave a written notice that the Defendant rescinded the contract on the above grounds, and on the 25th of August an action for the deposit was commenced.

L. JJ.
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The objection as to the three trees was as follows: The apparent outer boundary of the shrubbery along the western side of the property was an iron fence, which included three very large elm trees. The fact, however, was, that this iron fence was on the glebe land adjoining the vendors' property, the boundary being only marked out by some stumps within the shrubbery, and the three elms stood almost wholly on the glebe.

The material evidence relating to the trees and boundary was as follows:—

The Defendant, by his answer, said: "At and previously to the time of sale the visible boundary of the property on the west side, as it appeared to any person visiting it, was an iron fence outside of a belt of shrubs varying from about eleven to about fourteen feet in width, containing in it some trees of an enormous size and of great beauty, affording ornament and shelter to the residence on that side, and constituting the most attractive features of the property. At the time of sale the property appeared to any person going, as I did, as a stranger, to inspect it with the plan in my hand, and looking at the apparent and visible boundaries thereof, to comprise within its limits the whole of the said belt of shrubs on the west side thereof, with the ornamental trees therein up to the line of the iron fence outside the said belt of shrubs as the boundary fence on that side. Having visited the property with the plan in my hand, I was, in fact, led by the plan, verified by my own inspection, to believe, and I did believe, that the whole of the said belt of shrubs, with the ornamental trees therein on the west side thereof, formed part of, and were comprised in, the property then about to be submitted to sale, and in that belief I attended at the said auction, and bid for the said property."

The surveyor of the Defendant, in his affidavit, said: "At the time when I first visited the property, in May, 1868, the only visible and apparent boundary thereof on the western side, as it appeared to me, was an iron fence outside the belt of shrubs, which belt varied from about eleven to about fourteen feet in width, and contained in it some trees of enormous size and great beauty, affording ornament and shelter to the residence on that side, and constituting, in my opinion, one of the most attractive features of the property. The plan annexed to the said particulars, professing

to shew the property, apparently depicted the whole of the belt of shrubs on the western side as included in it, and forming part of the property, and the trees growing in the said belt of shrubs were, in my opinion, the main features upon which the property depended for its picturesque appearance, and tended to make it, as it is described in the said particulars, a most comfortable and enjoyable abode. When I so visited the property with the plan in my hand I was led by the plan, confirmed by my own inspection, to conclude, and I did conclude, and was under the impression, that the whole of the said belt of shrubs, with the ornamental trees thereon on the west side thereof, formed part of, and were comprised in, the property sold; and, speaking practically as a surveyor with very considerable experience, I say that the plan was so made as to lead not only the general public, but persons who, like myself, have practical experience of mapping and planning of estates, to the impression that the whole of the belt of shrubs was within the boundary of the property shewn on the plan as being the property intended for sale." He went on to say that in such a case both the true and visible boundaries ought to have been shewn and distinguished on the plan.

It appeared on the evidence that the purchaser was not aware until July that the purchased property did not extend up to the iron fence. The precise time when he first became aware of it was not shewn, but the Court considered that he was not shewn to have become acquainted with the fact earlier than the 10th of July.

The auctioneer at the sale gave evidence on behalf of the Plaintiffs, and in his affidavit stated that before the sale he went over the property with *Adams*, who was to make the plan, pointed out to him the true boundary (which had been shewn to himself by the vendors), and the fact that the elm trees were beyond it, and told him to be particular to measure from the true boundary shewn by the stumps. He further said, that at the auction no mention was made of the trees, and that, in his opinion, it would have enhanced the value of the property if the trees were included, and that if they had been, reference would have been made to them in the particulars and at the sale.

Adams, who described himself as a bailiff, gave the same account as the auctioneer as to the directions he received, and stated

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that he had measured from the true boundary, and excluded the trees from the plan. He stated that if the trees had been included in the sale he should have been particular to shew them distinctly on the plan. On cross-examination he said, that he did not call himself a skilled surveyor. He said that there was no shrubbery between the boundary and the wire fence, but there might be a bush or a briar; that the boundary stumps were shrouded by the shrubbery, and you would have to look for them, and they would not catch your eye readily, but you might see them if you had a quick eye. On re-examination, he said that the three elm trees were very much larger than the four trees which appeared in the meadow.

It appeared that before the end of June, 1868, the Defendant was contemplating re-selling the property; and it was sworn to by a witness on behalf of the Plaintiffs, and not denied in the evidence of the Defendant, that the Defendant had stated that he wished to dispose of it because his wife objected to it as a residence.

Vice-Chancellor *Malins* made a decree for specific performance, with costs (1).

(1) 1870. Mar. 15.

SIR R. MALINS, V.C.:—

The objections taken by the purchaser in this case are only three: first, that there is such a misdescription of the property as entitles him to be relieved; secondly, that there is an objection to title, as to which I stated my opinion yesterday that it is not a question of title at all, but a mere question of conveyance; and thirdly, that there is a deficiency of quantity.

Now, first, as to the misdescription of the property. The whole question has turned upon the representation of the western boundary in the sale plan—the north is towards a person looking at the plan, and therefore the west is to the right hand. Anybody looking at the plan would see that it was prepared with considerable care, nd it is impossible not to observe that there is an anxiety to depict every tree that is on the property. It is a small property, two acres and three-quarters, or rather less. All the trees in the kitchen-garden are marked, three trees in one corner of the meadow are marked, another at the top of the meadow is marked, and here is a clump of trees at the corner of the lawn all marked. There are two kitchen-gardens. I see there are trees on both which are marked. The great subject of discussion has been that there are three magnificent elm trees on the western boundary which the vendor says are planted in the glebe, because this property is bounded upon the west by the glebe land. It appears, upon the evidence, that these three trees were originally planted in the glebe, but in the course of a century while they have been growing the roots have extended into the Plaintiff's estate which is the sub-

Sir *Roundell Palmer*, Q.C., Mr. *Fooks*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

First, there was a misrepresentation as to quantity, large enough

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ject of the sale. Now, the Defendant says, "I considered that I was entitled to those elm trees;" and of course if he were entitled to the trees, he would be entitled to the land upon which they grew. How does he make this out? He says: "I looked at the property with the plan in my hand. I saw these three elm trees, they are beautiful objects, they are desirable for shelter, and without these three elm trees the place is comparatively valueless to me." Now it certainly is a very remarkable thing if he thought he was entitled to have these three elm trees, that when he saw all the other trees marked he should not have said at the auction to the auctioneer, "How does it happen that the three elm trees, which are the finest and most magnificent objects and most attractive upon the property, are not marked at all?" If he had asked that question, what would have been the answer? "It is not intended to sell them—they do not belong to the property, they belong to the glebe." He would have said, "I saw an iron fence, they are inside the iron fence." The answer would have been, "That iron fence is not the boundary of the property. It is merely put up by the rector or vicar to keep cattle from the plantation. The boundary is defined by the posts, the elm trees are beyond." Considering the nature of this plan, it is impossible that any rational man, if he thought he was entitled to have the trees as part of his purchase, would not have remarked upon the total absence of them from the plan. The purchaser made no inquiry, and, in my opinion, he was bound to make inquiry. The case that was cited by Mr. *Cole* of *White* v. *Bradshaw* (16 Jur. 738), is certainly, I think, a remarkably strong case, where a man without going to look at the property buys a house described as 39, *Regency Square, Brighton*. It turned out it was so called, but it formed no part of the square, being situate in a street between it and the adjoining square. In one sense the house was not in the square, but in another sense it was, being called part of the square. But His Honour did not rest his view of the case upon that fact. The house was known by the name of 39, *Regency Square*. The Defendant went to the auction and bought it by that name without inquiry, and Sir *James Parker* considered that he could not object to perform the agreement. Here the case is much stronger, because there the purchaser had not seen the property; here the Defendant had gone down, as I have said, and looked at the property with the plan in his hand, had seen the trees were not depicted, and by omission to make that inquiry I consider that he is absolutely bound not to require the trees as part of the property. I should have been of that opinion apart from what took place after the sale, but when I consider that the Defendant goes on negotiating as to the completion of the purchase, that he writes a letter by his solicitor on the 6th of July, expressing his anxiety to complete the purchase, the draft conveyance for which he had forwarded on the 18th of June preceding, I say, even if the objection had been one which he was entitled originally to sustain, he must be taken to have clearly abandoned it by his sub-

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to entitle us to rescind: *Aberaman Ironworks* v. *Wickens* (1). Secondly, we were misled as to the trees, which were an important element in the purchase. The description was calculated to mis-

sequent conduct. What is it he has bought? I quite agree with the statement of the law by the learned counsel for the Defendant, that if there was any material misdescription by the vendor that would prevent him from calling upon this Court to interfere in his favour in the way of specific performance. Nothing can be more important than that all vendors of property should honestly and faithfully describe what they have to sell, and if, whether intentionally or unintentionally, mistakes are made, if the purchaser has been led into the belief he is to have something which it turns out he cannot have, that is a sufficient ground for the Court refusing to interfere in favour of the vendor. Many cases were cited to me during the argument in support of that proposition, and they clearly establish it. If, therefore, in the present case there had been any misrepresentation, innocently made or not, which misled the purchaser, and it turned out he had been misled by it, I should have thought it fatal to the contract. I am certain that there was nothing calculated to mislead the purchaser who took the precautions he did. I am certain he was not misled by it—at all events by ordinary inquiry he might have learnt the real state of the case; and his own subsequent conduct shews conclusively that he was not misled. On that part of the case in my opinion he entirely fails. I also think that there is another strong argument against the Defendant, that practically he will have all the advantage that he contemplated having from these trees. They are stated to be a century old; probably they will last one or two centuries more; they are fine elm trees, they are on the glebe land, and the clergymen will have no right to fell them; and I am satisfied that for all practical purposes this gentleman will have as much pleasure in looking at the trees, if he resides in the house, and have the shade of them, as if he were the actual owner. The objection, therefore, in my opinion, is one of the most frivolous and trivial character under the circumstances of the case that was ever brought forward as a means of endeavouring to get out of a contract, but when I come to the two other objections, they are, if possible, still more frivolous and trivial.

The next is an objection to title. I must say the pertinacity with which this was urged upon me as an objection to title which was no objection to title whatever, has surprised me. The title has been accepted. There is no question of title, but it turns out, as stated by the 4th paragraph of this bill, that there are two mortgages on the property, and I need not say that a man who buys an estate free from incumbrances must have it free from incumbrance. This property is subject to a mortgage for £1000 to the trustees of the settlement of Mr. *George Denny*, who is the testator in the cause, the Plaintiffs being trustees under his will, and this mortgage has not been discharged effectually. There is also a mortgage of £2800 of part of the estate of a Mrs. *Bell*. Those are the only incumbrances upon the property, and

(1) Law Rep. 4 Ch. 101.

lead, and we were misled: *Weston* v. *Bird* (1); *Swaisland* v. *Dearsley* (2). Thirdly, a good title was not shewn, the trust fund had got into a wrong channel, and the original trustee, or his representatives, could not prove a good discharge: *Lewin* on Trusts (3). This is a question of title, not of conveyance: *Sidebotham* v. *Barrington* (4). Even if it were only a question of conveyance

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of course the necessary parties to free it from those two mortgage debts must concur in the conveyance. This is not a question of title. It was urged upon me, it was impossible it could be freed from those two mortgages. Am I to allow a bill to be dismissed upon the ground that it is impossible to allow of a discharge of two mortgages existing upon the property, one being payable to the trustees of the testator's marriage settlement, and the other to the trustees of Mrs. *Bell's* will. As regards the latter, the testator himself, being the surviving executor of her will, had invested a sum of £2800, part of her estate, upon investments which he did not think authorized, he desired therefore to adopt them for himself and give a good security for the £2800 on this property. He could not mortgage the property to himself, so he conveyed to a brother or a relative of his of the name of *Denny*, upon trust to secure £2800 to Mrs. *Bell's* estate. What is the consequence? Here is an admission that it formed part of Mrs. *Bell's* estate. It is said on the part of the Plaintiff that the surviving executors of Mrs. *Bell* can give a discharge. I do not give any opinion upon that question. It may turn out that they may not be the proper parties to give the discharge, or it may turn out that they are. Either the legal personal representatives of Mrs. *Bell*, or the trustees of her will, jointly or severally, can give a discharge, and nobody can pretend that this trust fund cannot be discharged by being paid to her trustees with the concurrence or without the concurrence of the legal personal representative. At all events the legal personal representative or the trustees of the will can give a discharge for the £2800.

Then, with regard to the £1000, that is due to the trustees of the marriage settlement of Mr. *George Denny*, the testator himself. His wife is dead, and the children of the marriage no doubt are the *cestuis que trust*; there is somebody no doubt who will be able to give a discharge. That is purely a question of conveyance, and nothing can justify the attempt that has been made to turn that into a question of title which is a mere question of conveyance. It must be referred to Chambers to settle the conveyance by all necessary parties. If it turns out there is insuperable difficulty in obtaining a release, and these mortgage debts cannot be discharged, the fact that the Plaintiffs cannot procure the concurrence of all necessary parties will be as fatal to this contract as if there had been a reference as to title, and it was found that a good title could not be made out. That, therefore, disposes of the only objection he has made as to title. [His Honour then proceeded to give his reasons for holding the objection as to deficiency of quantity to be precluded by the conditions.]

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(1) 2 W. R. 145.
(2) 29 Beav. 430.
(3) Page 450.
(4) 3 Beav. 524.

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we should be entitled to the costs of the suit: *Freer* v. *Hesse* (1). The title is doubtful: *Pyrke* v. *Waddingham* (2).

Mr. *Cole*, Q.C., and Mr. *Macnaghten*, for the Plaintiffs, in support of the decree, were desired by the Court to argue, in the first place, the question as to the trees:—

If the purchaser had looked to the measurements he could not have been misled, for it is clear on our plan that the whole shrubbery was not included. The plan is most minute as to trees, and the absence of these large trees from it is so conspicuous that no one can be heard to say that he did not notice it. *Swaisland* v. *Dearsley* (3) and *Weston* v. *Bird* (4) are totally different from the present case, which is governed by *White* v. *Bradshaw* (5). The very nature of the fence would put an intending purchaser on inquiry, for an iron railing is not a usual boundary between adjoining landowners. The purchaser cannot be heard to say he was misled, especially in a case where he is only seeking for pretences to get rid of a bargain as to which he has changed his mind on other grounds.

[The Court did not hear arguments by the Respondents on the other points.]

SIR W. M. JAMES, L.J.:—

I regret that I am unable to agree in the conclusion at which the Vice-Chancellor arrived on that part of the case on which alone we are now going to pronounce our judgment. His Honour appears to me to have been influenced by a suspicion that the objection was taken only because the Defendant, who had intended to purchase the property, had changed his mind, and sought out objections solely with the view of getting rid of a contract which was originally agreeable to him, but which afterwards, for reasons quite independent of the objection, had become disagreeable to him. I do not think it is the business of the Court of Chancery thus to inquire into motives. Of course, if the case depended upon the Defendant's own evidence we should look at the motive as affecting the value of that evidence; but apart from that we have only to consider whether, according to the rules of this Court,

(1) 4 D. M. & G. 495. (3) 29 Beav. 430.
(2) 10 Hare, 1. (4) 2 W. R. 145.
(5) 16 Jur. 738.

he was entitled to be relieved from this contract, or from specific performance of it, at the time when he gave the notice to rescind. I see no ground whatever for saying that after he had ascertained the fact upon which he now relies he in any way allowed the negotiation to proceed in such a way as to mislead the vendors, or to alter the relative positions of the vendors and himself. I therefore do not think that the delay which occurred between the 10th of July and the notice given on the 14th of August, coupled as it was with the intermediate notice to the vendors' solicitor, enables the Plaintiffs to resist the Defendant's contention, if that contention upon the facts was well-founded.

Now when we come to examine the evidence, I am bound to say, with all deference to the Vice-Chancellor's judgment in this matter, that the case is clear in favour of the Defendant. The Defendant tells just the sort of story that I myself should have told if I had been an intending purchaser, and had gone to inspect the property with the plan in my hand:—[His Lordship read the passages of the Defendant's answer which are set out above.] He has not been cross-examined, and I must say I have no doubt whatever that if I had done exactly what this gentleman did, and taken that plan in my hand, and gone through the property, and found a shrubbery, or ground covered partly with shrubs and partly with thorns, with an iron fence outside, I should have arrived at exactly the same conclusion as this gentleman did, and I should have gone to the sale and bid in the belief that I was buying the belt up to the iron fence with those trees upon it. Then the Defendant's surveyor, who says he has been for twenty years in the profession says:—[His Lordship read the above extract from the surveyor's evidence.] This gentleman, again, has not been cross-examined, and there really is not, in my judgment, a shadow of evidence in reply to his evidence that the plan was so made as to lead not only the general public, but persons who, like himself, had practical experience in mapping and planning, to the conclusion that the whole of the belt of shrubs up to the iron fence was included in the sale:—[His Lordship then stated the effect of the Plaintiffs' evidence given above, and continued:—]

There is no denial in evidence of this fact, that the plan produced was calculated to induce anybody to believe that the whole

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of the belt, or shrubbery, or whatever you may call it, was included in the property sold. It is urged, however, that the Defendant was negligent. The substance of the argument seems to be this: that if he had looked at the plan very minutely he would have seen that the trees in the meadows and in the garden were marked, but these three fine trees, which added so much to the value of the property, were not marked; and it is urged that the absence of these remarkable trees from the plan is a thing calculated to put a man so completely on his guard that he ought not to have been misled, and is not to be believed when he says he was misled. But it seems to me that it never would occur to a person who entertained no doubt whatever about what the thing was that had been sold to him, to make any inquiry about the omission of two or three trees in that which appeared on the plan to be a mass of wood. If this gentleman did as he says, buy it under a mistake as to the property, such mistake was caused by the plan which was presented to him, drawn by the vendors' agent, and also caused by this fact, which alone might have been enough to mislead him, that there was on the ground an apparent visible boundary, quite distinct from the almost invisible real boundary. I think that, independently of the plan, and on this latter ground alone, it would have required great consideration before a Court of Equity would have fixed the purchaser with this contract, which he swears he entered into in the belief that the property extended to its apparent boundary; but coupling the state of the property with the representation made by the plan, I am of opinion that it would not be according to the established principles of this Court to compel the purchaser to complete his contract. I am also of opinion that the mistake was occasioned by at least *crassa negligentia* on the part of the vendors in respect to what they sent out to the public. I am, therefore, unable to agree with the Vice-Chancellor, and am of opinion that he ought to have dismissed this bill with costs.

I have confined myself entirely to this one point, because the determination of it in favour of the Defendant disposes of the case. At the same time I wish it to be understood that I am not prepared—I will say no more than that—I am not prepared to concur in the judgment of the Vice-Chancellor with respect to the second

objection. Assuming the question to be merely a question of conveyance and not of title, the Defendant having insisted upon certain trustees joining in the conveyance for the purpose of giving him a receipt for his money, and the issue having been distinctly raised before suit whether he was right in so insisting—if after this the Court had come to the conclusion that he was right in his contention (and I think that the Court ought at the hearing to have come to a conclusion one way or other on this point), I should require to be satisfied that the Court would still hold the Plaintiff entitled to specific performance. In a case where the Plaintiff has refused to complete the sale on the footing on which he was bound to complete it, and the Defendant gives notice that if a proper conveyance is not given him he will rescind the contract, I am not prepared to say that the purchaser is to be held to his bargain after a delay of months, which has been occasioned by the ill-founded contention of the vendor. I have not heard the Plaintiffs upon this point, and I therefore give no opinion upon it. I simply wish to guard myself against being supposed to concur in some principles which seem to be laid down in the judgment of the Vice-Chancellor, which I should reserve for further consideration before I should agree with them.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me that in a property like this—a villa residence with a little more than a couple of acres of land, in the immediate neighbourhood of *London*—any person going to look at it, whether he carried a plan with him or not, would naturally assume, as a matter of course, the existence of some fixed boundary, some fence apparently separating the property he was going to purchase from the neighbouring one, and that, therefore, when a gentleman went to inspect this property with the plan in his hand, and walked round the footpath going near the boundary, and on looking through the shrubs saw an iron fence, and no other fence of any sort or kind visibly bounding the property, he would naturally come to the conclusion that this iron fence was the boundary, and he never would think that anything else could be the boundary, nor would he be likely to feel any such doubt as would induce him to ask a

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question about it. Then it turns out that *de facto* the iron fence is not the boundary. There has, therefore, been a mistake between the parties as to what the property purchased really consists of; and it is admitted on all hands that it is a material mistake, because the surveyor on the part of the vendor, no doubt with another object, states that these trees, if included, would have enhanced the value of the property; and it is sworn to, and is not contradicted, that the purchaser was *de facto* deceived. Nor is there anything to throw any doubt upon it.

Then the only question is, whether the plan and particulars were naturally calculated to deceive. I cannot but think that they were. It appears to me that when a surveyor is employed by a vendor to draw up a description of a property of this kind, and he goes to survey for the purpose of it, sees that the real boundary is almost invisible, and that there is a fence beyond it forming an apparent boundary, he ought, as a reasonably cautious man, to conclude that unless the plan and conditions are carefully prepared purchasers will be almost certain to fall into a mistake. I therefore should think it necessary not only to shew on the plan the relative situations of the real and apparent boundaries, but also to insert in the particulars express words describing the real boundary, as that boundary did not describe itself to people who went to look at the property. It really almost requires to my mind some charity—though I will have the charity—to suppose that he did not prepare his plan with the view of leading a purchaser to suppose the trees to be included, and omit these particular trees, in order that he might be able to say afterwards, "These were not intended to pass." It is remarkable that, according to the Plaintiffs' own evidence, the auctioneer, when instructing the surveyor, did not tell him to go to the place and frame his own description, but he took him round and pointed out the real boundary. It appears to me very clear that the purchaser has been deceived by the plan and the particulars respecting a material point, and that under such circumstances he certainly cannot be compelled to complete the purchase, the mistake having arisen, to say the least of it, through the negligence of the vendors' agents.

Solicitors: Mr. *F. W. Denny*; Mr. *Devonshire.*

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Election—Derivative Interest—Next of Kin.

A lady, having a power of appointment over the reversion expectant on her own decease in a trust fund in favour of any of her issue, to be executed before her children had all attained twenty-five, made within that period an appointment by deed among her three sons equally. By her will and codicils she purported to appoint the fund to her eldest son; and one of her sons having died intestate, she gave benefits out of her own property to her other surviving son and the children of the deceased son. All her children attained twenty-five in her lifetime. It having been decided that the fund belonged to the two surviving sons, and the estate of the deceased son, according to the appointment by deed, the eldest son filed his bill to put his surviving brother and the children of his deceased brother to their election. It was not shewn whether, at the time of the death of the testatrix, the estate of the deceased son had been wound up; but it ultimately became unnecessary to resort to his interest in the fund in question for payment of his debts:—

Held (reversing the decision of *Stuart*, V.C.), that not only the surviving younger son, but the children of the deceased brother were put to their election; but that, if the debts of the deceased son had not all been paid at the death of the testatrix, an apportioned part of them ought to have come out of the fund.

Grissell v. *Swinhoe* (1) explained.

THIS was an appeal by the Plaintiffs from a decision of Vice-Chancellor *Stuart*.

W. H. Cooper, by will, dated the 30th of May, 1840, gave an estate, called *Pain's Hill*, to trustees in trust for his wife *Hannah Cooper* for life, and after her death upon the trusts declared concerning his residuary real and personal estate. These trusts were (subject to certain provisions for the widow) to sell and hold the proceeds in trust for all or any one or more of his children, grandchildren, and issue respectively, to be born prior to such appointment, in such manner and form as his wife, before each and every of his children should have attained the age of twenty-five years or died under that age, should, by any deed or instrument in writing to be sealed and delivered by her in the presence of two witnesses, appoint, and in default of appointment, on the trusts therein mentioned.

(1) Law Rep. 7 Eq. 291.

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The testator left three children, *W. Henry Cooper* (who was the Plaintiff), *Roland Edward Cooper*, and *Frederick J. Cooper*.

On the 5th of April, 1841, Mrs. *Cooper* made an appointment by deed, by which, after providing certain sums for her three sons, she appointed the residue of the trust funds, including the proceeds of *Pain's Hill*, to her three sons equally on their attaining twenty-one, and reserved a power of revocation and new appointment.

On the 10th of April, 1841, Mrs. *Cooper* made a will, by which she "gave and appointed" *Pain's Hill* to the Plaintiff absolutely. At this time her sons were living, and had not all attained twenty-five. By a subsequent codicil she gave her residuary property equally to her three sons.

Roland E. Cooper died in 1858 intestate, leaving children; after which Mrs. *Cooper*, by a codicil, gave two-thirds of that share of her residuary estate which had been intended for him to his children, and the other third of that share to her two surviving sons.

Mrs. *Cooper* died in 1863, and all her sons had attained twenty-five in her lifetime.

After her death it was decided, in a suit of *Cooper* v. *Martin* (1), that, as Mrs. *Cooper's* children had all attained twenty-five before her will came into operation, the appointment therein expressed to be made of *Pain's Hill* was inoperative, and that the proceeds of sale belonged in thirds under the deed to the Plaintiff, *Frederick J. Cooper*, and the estate of *Roland Cooper*.

The Plaintiff then filed this bill to put *F. J. Cooper* and the children of *Roland Cooper* to their election, and, if necessary, to have Mrs. *Cooper's* estate administered. It did not appear whether, at the time of Mrs. *Cooper's* death, the estate of *Roland Cooper* had not been wound up, but ultimately it proved unnecessary to resort to his reversionary interest in the proceeds of *Pain's Hill* for payment of his debts. Vice-Chancellor *Stuart* having decided (2) that there was no case of election, the Plaintiff appealed.

(1) Law Rep. 3 Ch. 47.
(2) 1870. Feb. 23.

SIR J. STUART, V.C.:—

There seems to be insuperable difficulties in applying the doctrine of election to this case. In order to raise a case of election there must be an attempted disposition of property over which the testator has no disposing power, and a disposition of property of

Mr. *Greene*, Q.C., Mr. *Bristowe*, Q.C., and Mr. *Kekewich*, for the Appellant:—

The general rules of election are laid down in *Ingram* v. *Ingram*, cited in *Kirkham* v. *Smith* (1), *Thellusson* v. *Woodford* (2), *Whistler* v. *Webster* (3), and *Birmingham* v. *Kirwan* (4), all which cases support the Appellant's case. *Grissell* v. *Swinhoe* (5) went on the ground that, when the will came into effect, the property of which the will affected to dispose belonged to *A.*, and that *B.*, who received benefits under the will, and was sought to be put to his election, only acquired the property subsequently by derivative title. Here, when the will came into operation, *R. Cooper's* children were

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his own on such a footing as shews that he considered himself to have power to dispose of the former property. Here there is no gift of property which did not belong to the testatrix. There is, however, an attempted appointment; and it has been argued, on the authority of *Whistler* v. *Webster* (2 Ves. 367), and cases of that class, that an invalid appointment stands on the same footing for the purpose of election as an attempt to give property which did not belong to the testator. But in all those cases the question was between the persons in whose favour the invalid appointment was made and persons claiming in default of appointment who received other benefits under the will, and the case of election arose by reason of there being two gifts under the same instrument, one valid and the other invalid, and upon the presumption that the valid gift was made only on the footing that the invalid gift would take effect. That principle appears to me to have no application to a case where the question arises between a person claiming under an invalid appointment and other persons claiming under the will. But this is not the only nor the greatest difficulty. The whole doctrine of election rests upon this, that the testator gives his own property upon the footing that the other property which he has attempted to deal with, although the property of another, can be dealt with as his own property. But in the present case the invalid appointment does not stand alone; there had been a previous appointment, which the Court has held to be valid. There were, therefore, two intentions, one properly expressed, and the other improperly expressed; and it seems to me impossible that the Court, after giving effect to the one properly expressed, should go on to give effect, by the doctrine of election, to the one improperly expressed. There is also this further difficulty: The Plaintiff comes upon an invalid appointment to disturb a valid one; and while wishing to disturb the valid appointment, he seeks also to take a benefit under it. He cannot be permitted to approbate and reprobate—to say that he will take under the valid appointment, and also under the appointment inconsistent with it. There must be a declaration that no case of election is raised.

(1) 1 Ves. Sen. 258, 259.
(2) 13 Ves. 209, 220.
(3) 2 Ibid. 367.
(4) 2 Sch. & Lef. 444.
(5) Law Rep. 7 Eq. 291.

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entitled to the share which had been appointed to him by deed, and the ordinary rule applies. *Woolridge* v. *Woolridge* (1) turns on the peculiar doctrine applicable to powers where the testator does not give any property of his own. In *Howells* v. *Jenkins* (2) election, in a case like the present, was taken for granted.

Mr. *Springall Thompson*, for *Frederick John Cooper*, submitted to being put to his election.

Sir *Roundell Palmer*, Q.C., and Mr. *Rawlinson*, for the children of *Roland Cooper*:—

The cases cited on the other side, except *Grissell* v. *Swinhoe* (3), only set forth the general principle, which is not in dispute, that a person taking a benefit under a will cannot lay claim to anything which purports to be given by the will to somebody else. To see whether this applies, we must see whether the person is claiming the specific thing which the will purports to give away from him. Here the children of *Roland Cooper* take shares in his residuary personal estate, but they have no claims to any specific part of it. If there were large debts, the administrator could apply this interest in payment of them, and they could not complain.

[The LORD JUSTICE MELLISH:—Suppose just before the death of the testator the administrator had wound up *Roland Cooper's* estate and handed over the balance?]

That would raise a different question. If the estate had been wound up, and this interest in *Pain's Hill* had been assigned to the children, they probably must have elected; but all their right at the death of the testatrix was to have their father's estate administered.

[The LORD JUSTICE MELLISH:—As regards liability to debts, suppose an estate devised to trustees in trust to pay debts, and subject thereto for *A. B.* Do you say that *A. B.* would not have such an interest in the estate that he would have to elect?]

That is a clear case of specific interest. Here the father's estate cannot be put to its election, and the children have no specific

(1) Joh. 63, 69. (2) 2 J. & H. 706.
(3) Law Rep. 7 Eq. 291.

interest in any particular part of the assets. Suppose that, instead of being next of kin, they had been legatees or creditors of their father, could it be said that they were bound to elect? Yet in that case they would be receiving a benefit against the will of the testatrix. *Grissell* v. *Swinhoe* (1) supports our view, and *Lady Cavan* v. *Pulteney* (2) is closely analogous. The Vice-Chancellor seems to have thought that, as the testatrix had exhausted her power by deed, an attempt to exercise it by will was like an attempted disposition by an unattested codicil. But the analogy does not hold, the principle there being that an unattested codicil cannot be looked at; therefore there is no election.

Mr. *F. Bacon*, for the trustees of the settlement.

Mr. *Greene*, in reply.

Nov. 14. SIR W. M. JAMES, L.J.:—

The facts of this case are few and undisputed, and may be thus shortly stated:

A lady, having a power of appointment during a limited time in favour of any of her issue over (amongst other property) the proceeds of an estate, called *Pain's Hill*, directed to be sold, makes within that time an appointment by deed, which includes such proceeds, in favour of all her three children.

The lady survived the time during which she could exercise such power, and after her death it appeared that by her testamentary dispositions she, notwithstanding the appointment so made by her, had devised *Pain's Hill* to her eldest son by these words: "I give and appoint," and she gave all the residue of her property between her three children equally; and one of her children, *Roland Edward*, having predeceased her, she, by a codicil, gave to his children the greater part of the bequest intended for him.

The gift and appointment so made were held inoperative, and it was decided that the proceeds of *Pain's Hill* belonged, under the appointment by deed, to the two surviving children and the estate

(1) Law Rep. 7 Eq. 291. (2) 2 Ves. 544.

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of the deceased child *Roland Edward*, which estate, he having died intestate, belonged benefically to his children as his next of kin.

In this state of things the eldest son alleges that a case of election arises, viz., that his brother and his brother's children must either allow the whole of *Pain's Hill* to go according to the will to him, or must give up the other benefits provided for them by such will. The brother does not contest this. On behalf of the deceased brother's children it is contested; and the Vice-Chancellor was of opinion that there was no case of election. He appears to have thought that there was some distinction between an invalid gift of property which a testator believed to be his own and an invalid gift of property which the testator knew not to be his own, but which he believed he had a power of appointment over, which he had not. I am unable to find any authority or any principle on which to rest this distinction. It is in both cases in substance a disposition, or an attempted disposition, by will, of property over which the testator has no disposing power. His Honour also appears to have thought that a difficulty was created by the fact of the two appointments—the first valid, the second invalid—and that it was a case of two intentions, one properly expressed, the other improperly expressed. I am unable to concur in this. It is not a question of expression of intention, but a question of intention. The lady intending to appoint did in her lifetime appoint the property, so as to make it her children's. She nevertheless, by her will, attempts to make a different disposition; that is to say, she attempts and purports to give by her will that which was not hers but her children's. It does not appear to me in any wise material by what previous title it had become the children's. At her death they are found to be the true owners of property disposed of by her, and at the same time they are found to be named as objects of her testamentary bounty. That seems to me to state the requisites, and the only requisites for raising the obligation to elect. Indeed, the view taken by the Vice-Chancellor was but faintly, if at all, pressed upon us.

What was pressed upon us was this, that the children of *Roland Edward* were not the owners of the one-third of *Pain's Hill* within the meaning of the rule; that what they were entitled to was not

Pain's Hill, or any part of *Pain's Hill* in specie, but a share of the ultimate residue, whatever that might be, of the entire personal estate of the intestate in a due course of administration; that it vested not in them, but in *Roland Edward's* estate, and that their share was an incident to that estate. In support of that contention, a decision of mine, when Vice-Chancellor, was much pressed upon us—*Grissell* v. *Swinhoe* (1); but the decision there, whether right or wrong, proceeded on the assumption that the legatee's title to the property did not exist at the death, but was a derivative title through the title of another person who was the true owner at the death; just as if in this case the children of *Roland Edward* had been objects of the testatrix's bounty, and *Roland Edward* had survived the testatrix, and afterwards the children had succeeded beneficially to his estate, including his share of the proceeds of *Pain's Hill*.

I am of opinion that, for the purposes of election, no distinction can be drawn between personal estate and real estate, between specific and residuary legatees, or between legatees and next of kin of an intestate. The whole property of an intestate devolves beneficially on the next of kin, subject to his debts and funeral and testamentary expenses. The fact that for convenience there is an officer, formerly of the Ordinary, now of the Court of Probate, interposed to get in the property, pay debts, and then distribute, does not substantially alter the real beneficial ownership. This case seems to me to be exactly the same in substance as if *Roland Edward* had been entitled to *Pain's Hill* as realty and not as personalty, and he had devised all his property, real and personal, to trustees, upon trust to sell, pay debts, and divide between his children. In that case I apprehend it would not have been argued that their interest in *Pain's Hill*, and their benefit under the sale, would not have been the subject of election. I hold the present case to be substantially the same.

That brings me to the only other question. Is *Pain's Hill*, for the purpose of election, to be considered as free from the intestate's debts and expenses, or as burdened with its proportion of them? I do not know whether, in fact, that question is very material in this particular case. But, in my opinion, that is to be determined

(1) Law Rep. 7 Eq. 291.

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according to the state of things at the testatrix's death. If at the testatrix's death the estate had been cleared of all debts, that estate so cleared was what she purported to give; if it was not so cleared, I am of opinion that it must be considered as subject to its rateable apportionment of all debts and charges then payable out of the general personal estate. I am of opinion that the declaration of the Vice-Chancellor, complained of by this petition of appeal, is erroneous, and that the Appellant is entitled to have substituted the declaration sought by him. The costs of all parties must come out of the estate; and I presume that there will be no difficulty in arranging the minutes of the decree, based on the substituted declaration.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *White, Broughton, & White;* Messrs. *Simpson & Dimond.*

L. JJ. 1870 *Nov.* 14.

MORDUE *v.* PALMER.

Arbitration—Award—Correction of Clerical Error—Costs as between Solicitor and Client—Laches—Acquiescence.

An arbitrator having signed his award is *functus officio*, and cannot alter the slightest error in it, even though such error has arisen from the mistake of the clerk in copying the draft. The proper course in such a case is to obtain an order to refer the award back to the arbitrator.

An arbitrator made his award on the 12th of November. His attention having been called, by the Plaintiff's solicitor, to an accidental omission in it, he signed a fresh award on the 2nd of December, which was sent by the Plaintiff's solicitor to the Defendant with a letter of explanation. The Defendant took no notice of it till the 10th of June, when the Plaintiff sought to enforce the award, and he then objected to its validity:—

Held, that the Defendant was entitled to treat the second award as a nullity, and that his delay did not amount to acquiescence in its validity.

The decision of *Bacon*, V.C., reversed.

An arbitrator, to whom the matters at issue in a suit, including the costs of the cause, have been referred by the Court of Chancery, has power to award costs as between solicitor and client.

THIS was an appeal from two orders of Vice-Chancellor *Bacon*, made upon a motion and cross-motion, under the following circumstances:—

On the 17th of January, 1868, an order was made by consent referring all matters in difference in this cause between the parties to the arbitrament and determination of *Henry Udall*, Esq., who was to make his award in writing on or before the 17th of April, 1868; and it was by the like consent ordered that the costs of the cause, and of that application, and of the reference thereby directed, be in the discretion of the arbitrator; and by the like consent the arbitrator was to have power from time to time to enlarge the time for making his award as he should think fit, and either party was to be at liberty to apply, without notice to the other party, that the award might be made an order of this Court.

On the 9th of March, 1868, the time for making his award was enlarged by the arbitrator until the 17th of April, 1869. On the 12th of November, 1868, the arbitrator made his award. On the 23rd of November a copy was applied for by the Plaintiff's *London* solicitors, Messrs. *Williamson, Hill, & Co.*, and by them sent to their client in the country. No copy of this award was applied for by, or furnished to, the Defendant. On the 30th of November, 1868, Messrs. *Williamson, Hill, & Co.* received a letter from the country firm calling attention to what they considered as an error in the award with respect to costs. Messrs. *Williamson* took their letter to the arbitrator, who, on reading it, at once told them that he had fully intended to give the Plaintiff the costs of the reference, although these words were not to be found in the award signed by him on the 12th of November. On the following day the arbitrator stated that, upon consideration, he was of opinion that he could make another award in lieu of that of the 12th of November, accompanied by an explanatory letter. Accordingly, on the 2nd of December, 1868, the arbitrator signed an award which was identical with that of the 12th of November, with this exception, that it contained the words, "and the costs of the reference" omitted from the award of the 12th of November.

Mr. *Udall's* award was accompanied by the following letter, dated the 2nd of December, 1869:—

"I herewith send you my award in this case, dated this day. On referring to the paper which purported to be my award, and which I previously delivered to you, I find that there was an

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omission in the fair copy sent to be engrossed of the words, 'and the costs of the reference,' before the words 'shall be paid and borne by the Defendant.' These omitted words were in the draft I settled, and I thought when I purported to publish my award that they were contained in the engrossed copy. As I find there has been this omission, I am of opinion that I have not made my award in this case before the one which I now send to you. On reading that which you previously had delivered to you, it will be evident that, in the absence of the omitted words, the word 'borne' is not applicable to any matter that precedes it.

"If you have served a copy of that which I had previously delivered, I think you should now serve a copy of that which is my award, together with a copy of this letter. If you have not served a copy, then I think also when you do serve such copy, you should also send a copy of this letter, so that the other side may be informed that my award was not made until to-day. Of course I need not point out, that although I, in express terms, declared that I had disposed of all matters in difference, it is evident upon the face of the paper writing that I had not done so if the omitted words were left out. I may observe that the course I have now pursued is done not only on my own opinion, but also by the advice of a gentleman at the Equity Bar. All gentlemen whom I have spoken to are of opinion that, as this was an omission in the copy, I had not made my award before the one I now send, as the time for making my award does not expire until the 17th of April in next year."

The award and the letter were both sent to the Defendant's solicitor on the 3rd of December, 1868. On the 18th of March, 1869, upon motion (*ex parte*) by the Plaintiff, an order was made by Vice-Chancellor *James* that the award dated the 2nd of December, 1868, be made an order of this Court.

Nothing further took place until June, 1870, when, on the Plaintiff's solicitors proceeding to get the costs taxed, a letter, dated the 23rd of June, 1870, was sent to them by the Defendant's solicitors in the country, asking them to allow the taxing of the costs to stand over for a little, with a view to an arrangement between the parties.

Upon attending the taxation on the 30th of June, 1870, the

Defendant's agent, for the first time, objected to the award of the 2nd of December.

Under these circumstances the Plaintiff moved that the Defendant might be ordered to pay to him the sum of £400 by the award of the 2nd of December, 1868, awarded and ordered to be paid by the Defendant to the Plaintiff; and that the Plaintiff's costs of suit, and his costs of application for the order of reference, and of the reference, and all other the Plaintiff's costs by the said award directed to be paid by the Defendant to the Plaintiff, might, pursuant to the said award, be taxed as between solicitor and client, and that, pursuant to the said award, the Defendant might be ordered to pay to the Plaintiff the said costs when so taxed, and also the charges by the said award directed to be paid to the Plaintiff by the Defendant.

This motion was met by a cross-motion on behalf of the Defendant that the order of Vice-Chancellor *James* of the 18th of March, 1869 (making the award a rule of Court), might be discharged, on the ground that the paper writing, dated the 2nd of December, 1868, was not the true award of Mr. *Udall*, and that such alleged award was made after Mr. *Udall* had made a previous award and after communications with the solicitors or agents of the Plaintiff, in the absence of the Defendant and his solicitors or agents. He also objected to the award, as giving costs as between solicitor and client.

The Vice-Chancellor was of opinion that the arbitrator had power to make the new award, and that he had not exceeded his authority in awarding costs as between solicitor and client (1). The Defendant appealed from this decision.

(1) 1870. July 22.

MR. BACON, V.C.:—

All cases which relate to awards are of importance, because they involve principles which are of the utmost value, and rules which ought always to be adhered to. In the passage read from *Russell* on Arbitration (p. 132), in which every one of the authorities which have been mentioned is found and cited, those principles and rules are stated accurately and distinctly. The cases shew instances in which awards may be set aside if an arbitrator has, after his powers have expired, attempted to exercise those powers. Awards may also be set aside by reason of impropriety of conduct on the part of the arbitrator by communication with parties on the one side in which the others did not participate; and mistakes made by an arbitrator, in many

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Mr. *Fry*, Q.C., and Mr. *Chitty*, for the Appellant:—

On the 2nd of December the award had been already made and published by the execution of the award of the 12th of November,

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cases, cannot be rectified, at least not by the act of the arbitrator. The most that can be done to rectify mistakes in matters of award is by the exercise by the Court of its power to remit the matter back to the arbitrator. Those principles are beyond all question. The important question in this case is, whether any one of them is involved in the circumstances here existing. There is a temptation no doubt held out to the Court, and a very strong one, to decide this case only on the point of time, but I do not think, after having listened to the argument I have heard, that I should do well to deal with it only upon the point of time. It is said that when the arbitrator had on the 12th of November, 1868, made his award, his powers had then expired; there was an end of his function, and it was not in his power to alter the instrument which he had then executed. No doubt, in a sense, that is true, and it would not have been competent to him to alter the name—as in one of the cases which has been referred to—from Plaintiff to Defendant, because the Court, which is to decide on the question whenever it is raised, would have no means of knowing whether the alteration which he desired to make was from some subsequently exercised act of judgment by him, or whether it was a mere mistake, and it would be impossible to have satisfactory evidence upon that subject. But the facts here are, that having made his award, having in one sense, therefore, to that extent discharged his function, he is reminded that there is something upon the face of the award which appears to be omitted. He looks to his own draft, he finds that his draft has been miscopied. There is no mistake on his part, no subsequent act of judgment exercised by him; but finding that that mistake has been made, and probably not being inclined to interline or alter anything that was upon the face of that award, he makes another award in which the mistake is not.

I should be very unwilling to have it understood that I call in question any of the well-settled principles that have been referred to as to the validity of awards, and their invalidity by reason of alterations made in the award after the arbitrator's power has expired, or the mischievous consequences that may ensue from communications by one party behind the back of the other with an arbitrator. Nothing is further from my intention than to do so. I admit, without hesitation, the authority of all the cases that have been referred to on behalf of the Defendant, and that the passage referred to in *Russell* on Arbitration (p. 132) does state distinctly the law applicable to the subject of awards. But no case has been cited, nor am I aware of any case that exists, in which it has been held that an arbitrator having made, I do not say a mistake, but having discovered that the instrument which he had executed was erroneous—contrary to his judgment — has not been at liberty to rectify it.

That is not in the slightest degree at variance with *Ward* v. *Dean* (3 B. & Ad. 234), or any other of the cases that have been referred to. The Court was there placed in this difficulty: How can we by possibility tell whether the act subsequently done by the arbi-

in the presence of and attested by a witness: *Brooke* v. *Mitchell* (1). The arbitrator thereupon was *functus officio*, and the document signed by him on the 2nd of December is a mere piece of waste

trator, in the one case where he had made a miscalculation, and in the other where he had written Defendant for Plaintiff, was a mistake, or an exercise of his judgment: there are no means of ascertaining that. But where is the authority for holding that where the means of ascertaining what is called, and erroneously called, the mistake, are distinctly in existence, the instrument in which that which has been omitted is supplied is not a perfectly valid instrument, where it is no extraneous exercise of the authority of the arbitrator, nothing done by him after his function has expired, but simply setting right that in the shape in which it ought to have been while his powers were in full vigour? No such case has been referred to; and no such case, I believe, can be found: —[His Honour then referred to the facts of the case, and continued:—] I cannot perceive the slightest resemblance between the case as proved in evidence and the cases referred to, and properly referred to, because they lay down very distinct, valuable, and useful principles. If the arbitrator had died immediately after he had executed that award, how it might have been if, upon the jurisdiction which prevails in this Court, a bill had been filed to rectify that award, and distinct evidence adduced of the draft in the handwriting of the arbitrator, and the error which had been made by omitting these words, it is not necessary for me now to say, nor do I give any opinion: at least the question might have been so raised. But, upon the matter as it now stands, in my opinion the function of the arbitrator had not expired when his attention was brought to the fact that the paper writing signed by him did not express his judgment. I think it was competent for him to make that which is called the award of the 2nd of December, and to make it a valid and binding award; and though it is not absolutely necessary for the decision of this case to express that opinion, yet I think it right to do so by reason of the argument that has been urged before me, and that it may not be supposed that I have not paid as much attention as I am able to give to that particular part of the case. But then, if that were otherwise, the question of time seems to me to be conclusive beyond all doubt.

In December, 1868, the Defendant is apprised that an award has been made, in which are inserted words not contained in the former award. From that time until a very recent day no sort of objection has been raised by the Defendant. If it were not limited by the time mentioned in the statute for calling in question the award, is it too strong to say that he has adopted it? His silence amounts clearly to an adoption of it, but his conduct does so still more distinctly. [His Honour referred to the letter from the Defendant's solicitor of the 23rd of June, 1870.] If neither of the statutes (9 & 10 Wm. 3, c. 15, and *Common Law Procedure Act*, 1854), the policy and meaning of which are to limit the time within which objections can be taken to awards made and communicated to the other party, were in question, I should still

(1) 6 M. & W. 473.

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paper, and any order based upon it is a nullity. He is not at liberty to correct even a manifest error in the calculation of figures or any other accidental mistake, although the amendment is made to correspond with his original intention: *Russell* on Arbitration (1); *Henfree* v. *Bromley* (2); *Irvine* v. *Elnon* (3); *Ward* v. *Dean* (4).

The award is also voidable on the ground of communications having taken place between the arbitrator and the Plaintiff in the absence of the Defendant: *Harvey* v. *Shelton* (5); *Mills* v. *Bowyers Company* (6).

It is also bad on the ground that the arbitrator has directed the costs to be taxed as between solicitor and client, which an arbitrator, unless specially authorized, has no power to do: *Whitehead* v. *Firth* (7); *Russell* on Arbitration (8). In the present case the payment of costs between solicitor and client was not prayed by the bill.

The statute of 9 & 10 Will. 3, c. 15, s. 2, as to the time within which an award may be impeached, does not apply, as we are not seeking to set aside the award; but we are resisting the order of the 18th of March, 1869, as being based upon a document which is a mere nullity. There has been no laches or acquiescence on our part. We were entitled to treat the second award as non-existing. It was not for us to take any steps, but to wait until the Plaintiff attempted to enforce it: *Smith* v. *Whitmore* (9).

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say that the time prevented the Defendant from coming now to set aside the award on which the Plaintiff insists. True it is that the Defendant's motion is not to set aside the award, but to set aside the order of March, 1869, as having been improperly made. Whether it has been improperly made or not depends very much on the substance of the case; but if it is improperly made, then merely setting aside the order has nothing whatever to do with the cause. If the award is invalid, that order does not make it more valid. [His Honour then referred to the other objections which had been made to the award, which he was of opinion were entitled to no weight; and concluded by deciding that the award was perfectly valid and the Plaintiff entitled to enforce it].

(1) 3rd Ed. p. 132.
(2) 6 East, 509.
(3) 8 Ibid. 54.
(4) 3 B. & Ad. 234.
(5) 7 Beav. 455.
(6) 3 K. & J. 66.
(7) 12 East, 165.
(8) 3rd Ed. p. 363.
(9) 1 H. & M. 576.

Mr. *Kay*, Q.C., and Mr. *G. Williamson*, for the Plaintiff:—

If the Defendant cannot move to set aside the award he cannot move to set aside the order by which it has been made a rule of Court; and in any case our right under the award will not be affected even if the order of the 18th of March, 1869, is set aside, as the award may be enforced although it has not been made a rule of Court, and the order was unnecessary. Independently of the question of time, no valid objection can be taken to the award. In the cases cited there was a new and distinct act of judgment by the arbitrator after he was *functus officio*. Admitting that the arbitrator, when he has once made his award, cannot even correct a manifest error upon the face of it, the document of the 12th of November, 1868, was not the arbitrator's award, as by the omission, through the mistake of the clerk, of words which formed part of his award, the arbitrator has put his hand to a document which did not express his judgment. *Henfree* v. *Bromley* (1) is in our favour, for Lord *Ellenborough* draws a distinction between that case and the case of a mere mistake. In *Ward* v. *Dean* (2) there was no draft in existence to shew the intention of the arbitrator. This is like the case of a person executing a deed which has been wrongfully read over to him: the deed is altogether void: *Vorley* v. *Cooke* (3). Moreover, the document of the 12th of November was not published or communicated to the Defendant, and the award of the 2nd of December was the only award made and published by the arbitrator; and after the explanation contained in the letter which accompanied that award, the Defendant has been in no way misled. In any case, the objection to the award is most trivial and technical; for it would have been referred back to the arbitrator as a matter of course if the alteration had been complained of at the time: *In re Dare Valley Railway Company* (4). But now the time which has elapsed is a complete answer to the Plaintiff's application, either by the 9 & 10 Will. 3, c. 15, s. 2, or by the *Common Law Procedure Act*, 1854, s. 9.

[The Respondent's counsel were not called on with respect to the other points.]

(1) 6 East, 309.
(2) 3 B. & Ad. 234.
(3) 1 Giff. 230.
(4) Law Rep. 6 Eq. 429.

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SIR W. M. JAMES, L.J.:—

In this case the Vice-Chancellor granted the order asked for by the Respondent, in substance enforcing the second award, or document purporting to be an award, and refused the application of the present Appellant to set aside the order making the award an order of the Court. He gave no costs of the application to either party. We do not mean to interfere with the decision of the Vice-Chancellor as to the costs.

It appears to us that the objection of the Defendant is idle and simply technical, as he must have known from the first that it would be set right immediately upon an application to the Court. At the same time it is necessary that we should abide by what has been decided by the authorities, and we cannot in substance distinguish this case from *Ward* v. *Dean* (1), where the mistake was as simply clerical as could possibly be made. But even in the state of the law as it then existed, when the Courts had no power to rectify any mistake in an award, it was thought a safe thing to keep the arbitrator strictly to his award, and to shut the door against the admission of evidence as to what the arbitrator intended to do, or had omitted to do. It was considered dangerous to admit anything but the written document, which, once signed, must stand. That decision was doubtless in the contemplation of the Legislature when it passed the *Common Law Procedure Act*, the provisions of which on this subject have been followed by the Courts of Equity. That Act provides means of obviating any mischief or injustice which might arise from any slip or omission of the arbitrator. We think it is the safest plan to abide by the course there pointed out, so that in case of such a slip the parties should come to the Court and let the Court know all the facts, and that the act should be done as an act of the Court, and not of the arbitrator, who is *functus officio*.

In the present case the error was the plainest and clearest of all mistakes. That being so, we think it right to refer it back to Mr. *Udall* to reconsider and redetermine the matters referred to him in respect of the mistake certified by him to have been made by him in the award of the 12th of November.

(1) 3 B. & Ad. 234.

Two other points were also argued. In the first place an objection was taken to the award on the ground of Mr. *Udall* having had interviews with one of the parties behind the back of the other. I agree in the extreme importance of preventing the arbitrator from receiving evidence or hearing arguments in the arbitration in the absence of one of the parties. But in this case there was nothing more than a communication from one party asking him whether he had not made a mistake in copying the award. There is no ground whatever for saying that he was induced to alter the award by any communication from either party. If we had thought that there was any ground for such a charge, we should not have referred the matter back to him, but to some other person.

The other point insisted on was that the arbitrator had no power to award costs as between solicitor and client. That is a matter which, in my opinion, cannot make the award void on the face of it. Not only the questions in the suit were referred to him, but also the costs of the suit and of the award and reference. He has come to the conclusion, having regard to the fiduciary relation between the parties, that the costs should be paid as between solicitor and client. It is not our duty to express any opinion upon this conclusion, except that he had jurisdiction to make it, and that his decision is final.

Both the orders appealed from must be discharged without costs, and the matter must be referred back to the arbitrator.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the result of the cases at law is, that when an arbitrator has signed a document as and for his award, he is *functus officio*, and he cannot of his own authority remedy any mistake. I regret the costs and delay which have been occasioned in this case, but I think it is right that in all such cases the parties should come to the Court to remedy the mistake.

I think it is also clear that the Defendant has done nothing to waive the objection. It is an objection which could not be waived except by something from which you could infer an agreement by the Defendant to accept this as a valid award. I can see no such

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agreement here: there is nothing except Mr. *Udall's* letter; and I cannot understand how a party, by not answering that letter, can be considered as consenting to treat a document as binding which by law was not binding.

I also agree as to the question respecting the costs. The Common Law Courts have no power to give costs between solicitor and client, and therefore, when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with Courts of Equity; and I therefore think that, when a reference as to costs is made by a Court of Equity, the Court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit.

Solicitors for the Appellant: Messrs. *Shum & Crossman.*
Solicitors for the Respondent: Messrs. *Williamson, Hill, & Co.*

L. JJ. 1870 Nov. 10, 15.

DICCONSON *v.* TALBOT.

Power of Sale and Exchange—Trustee—Purchase by Tenant for Life—Concealment.

A tenant for life of settled estates made an arrangement with a neighbouring landowner for an exchange, subject to certain special terms as to the mines. This was intended to be carried into effect by the trustees of the settlement, who had a power of sale and exchange exerciseable at the request of the tenant for life, and the trustees agreed to do so; but, owing to the terms as to the mines, they could not safely effect the exchange under the power, and the tenant for life proposed that he should buy the property which was to have been given in exchange, and effect the exchange himself. He accordingly bought the property, paid the price, and afterwards made the exchange as owner in fee. Another similar transaction took place as to another property, and the tenant for life stated to the trustees, as an inducement to sell to him, that the acquisition of the property which he was going to take in exchange for it, and which was between the settled estate and a railway, would give the mines on the settled property access to the railway. After the death of the tenant for life the remainderman filed his bill against the representatives of the trustees and the devisees of the tenant for life, impeaching the sales to the tenant for life, alleging that they were made at an undervalue; that the tenant for life had concealed from the trustees the value of the mines under the first property; and claiming to have the properties which had been taken in exchange brought into settlement on the ground that the sales were colourable, and only intended as an indirect way of effecting exchanges;

or, at all events, that the settled estates might have a way-leave over the property acquired on the second exchange.

The Court was satisfied, on the evidence, that there had been no concealment, and that the tenant for life had given a fair price :—

Held (affirming the decision of *Stuart*, V.C.), that as a tenant for life, though his consent be requisite to the exercise of a power of sale, stands in no fiduciary position towards the remainderman, and is as free as any one else to buy from the trustees, a sale to him cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate.

Whether a tenant for life purchasing from the trustees is not in a different position from a stranger as regards obligations to communicate what he knows as to the value of the property, *quære :*

Held, further, that the statement by the tenant for life as to the access to the mines was a correct statement of a fact, and not a representation that the owners of the settled estates should have a perpetual way-leave over the property taken in exchange.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*, dismissing the bill, except so far as related to the taking certain accounts.

Under a settlement, an estate called the *Wrightington* estate was limited to *Charles Scarisbrick* and his assigns for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of *Charles Scarisbrick* successively in tail male, with remainder to his daughters in tail, with divers remainders over. The settlement contained powers of leasing for agricultural, building, and mining purposes, and a power to trustees, "at the request" of any person of full age who was in actual possession of the estate, to sell or exchange in the usual way.

In 1844 negotiations took place between *Charles Scarisbrick* and Earl *Balcarres*, with a view to an exchange of a property called *Bottling Wood*, which was part of the *Wrightington* estate, and contained about thirty acres, for an equal amount of land belonging to the Earl; and on the 14th of November, 1844, the agents of *Charles Scarisbrick* and of the Earl signed an agreement for such exchange, the mines under each property being reserved. It was intended that the trustees should carry this exchange into effect under their powers. After this, it was proposed to exchange the lands with the mines, but subject to some special conditions which amounted to a partial reservation of the mines. The

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trustees of the *Scarisbrick* settlement thought this exchange desirable, but it was found that there were legal difficulties in the way, arising out of the reservation as to mines, and ultimately, in 1850, *C. Scarisbrick* proposed that he should purchase the *Bottling Wood* property, and he offered to give £300 per *Cheshire* acre and pay for farm-buildings and timber. The price ascertained on this footing was £4666 5*s.*, which was paid to the trustees in 1851, when the purchase was completed. *C. Scarisbrick* then carried into effect the exchange with Lord *Balcarres,* who conveyed the property which he gave in exchange to *C. Scarisbrick* in fee.

In December, 1850, the solicitor of *C. Scarisbrick* wrote to the solicitor of the trustees a letter to the effect that the southerly and south-easterly portions of the *Wrightington* estate contained valuable mines, but that they had been unproductive for want of railway communication, though near a railway, and that Mr. *Scarisbrick* was endeavouring to purchase the lands between the settled estates and the railway to open out a market for the coal, and had bought some of them; that Mr. *Talbot* was owner of an estate so situate, which he was willing to exchange for a detached property in *Heskin* forming part of the settled estates, which was of equal extent; but that, as the *Heskin* property had no mines, Mr. *Talbot* proposed to reserve the mines; that it was doubted whether such an exchange was within the powers of the trustees, and that it was proposed to obviate the difficulty, as in the other case, by Mr. *Scarisbrick* buying the *Heskin* property from the trustees and then effecting the exchange himself. The letter went on to say: "It is of importance to the *Wrightington* property to secure this communication to the railway, and on that ground I am desired, through you, to ask the concurrence of the trustees;" and stated that *C. Scarisbrick* would give thirty years' purchase, reckoning the rent at £3 per *Cheshire* acre, which the writer stated was the highest rent for land in the district. The trustees acceded, the purchase was completed, and the purchase-money paid, after which the exchange with Mr. *Talbot* was carried into effect by *C. Scarisbrick,* as absolute owner, the estate taken in exchange being conveyed to him in fee.

C. Scarisbrick died in 1860, a bachelor, leaving a will, by which he gave all his real estate to trustees upon trusts which wholly

severed them from the settled estates. The Plaintiff became the owner of the estates comprised in the settlement. Both the trustees, in whom the powers of sale and exchange were vested, died before the suit.

In 1864 the Plaintiff filed his bill against *Talbot* and *Part* (the trustees of *Charles Scarisbrick's* will), and against the representatives of the trustees of the *Scarisbrick* settlement, praying for an inquiry as to the dealings of the trustees under the power of sale and exchange, and whether the purchases, sales, and exchanges made by them were properly made; and that if it should appear that the sale of *Bottling Wood* was improperly made, then that *Talbot* and *Part* might be decreed to convey to the Plaintiff the land which *C. Scarisbrick* received in exchange for it, the Plaintiff repaying the purchase-money, less the value of the minerals already gotten; and that the Plaintiff might be declared entitled to the land received in exchange from Mr. *Talbot*, and that *Talbot* and *Part* might convey it to him on his repaying the purchase-money received by the trustees of the settlement for the *Heskin* property, or that a right of way for his coals might be secured to him over such land; and that the representatives of the trustees of the settlement might answer out of the estates of the trustees such loss occasioned by any neglect or default of the trustees as was not made good by *Part* and *Talbot*. The bill alleged the sale of *Bottling Wood* to have been at an undervalue. In support of this the Plaintiff relied on the fact that, in 1848, a Mr. *Part*, a brother of the Defendant of that name, had agreed with *C. Scarisbrick* to take a lease of a portion of the coal under *Bottling Wood* and other lands, at £70 per foot per acre. The Plaintiff further founded an equity on the allegation (which was not proved) that this circumstance was not made known to the trustees. There was, however, a want of evidence to shew that the property would have fetched a higher price at the time than *C. Scarisbrick* gave for it. It did not appear that the trustees had the property surveyed, but there was evidence that it had been purchased by the trustees from *C. Scarisbrick* about five years before, at a somewhat less price than that which they received for it in the transaction now in question.

As regards the estate received in exchange from Mr. *Talbot*, the

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case made by the bill was founded on the fact that the gaining access from the settled mines to the railway had been held out to the trustees as an inducement to concur in the transaction, and on the allegation that the existence of valuable stone on the *Heskin* property was known to *C. Scarisbrick*, and not communicated by him to the trustees.

The Vice-Chancellor *Stuart* dismissed the bill with costs, except as to so much as asked the common accounts of the dealings of the trustees of the settlement, giving leave to the Plaintiff to apply by summons as to the delivering up of certain title-deeds.

Mr. *Greene*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Riddell*, for the Appellant:—

We say that the transactions here were a fraud upon the power. An exchange was intended, and the parties turned it into a sale to get rid of a conveyancing difficulty. Exchange being the object, the transaction ought to be treated as an exchange, and the property received in exchange ought to be brought into settlement. Then there is evidence of undervalue and concealment. Though, according to *Howard* v. *Ducane* (1), a tenant for life may buy from the trustees, still he is in a fiduciary position, and is bound to communicate what he knows.

The LORD JUSTICE JAMES:—How can the two propositions, that a man is in a fiduciary position and that he is at liberty to buy the estate, stand together?

Sir *Roundell Palmer*, Q.C., Mr. *Morgan*, Q.C., and Mr. *Charles Hall*, for *Talbot* and *Part*, and Mr. *Karslake*, Q.C., and Mr. *Rasch*, for the other Defendants, were not called upon.

SIR W. M. JAMES, L.J.:—

The Vice-Chancellor was of opinion that the Plaintiff's case, so far as related to the matters which have been discussed before us, failed, and he accordingly dismissed that part of the bill. I am entirely of the same opinion, and, in my judgment, a case with less foundation, or more idle and vexatious, has seldom been brought against the representatives of deceased trustees. The law

(1) T. & R. 81.

is quite settled that where a power of sale is given to trustees, to be exercised at the request or with the consent of the tenant for life, the trustees may sell to him as they might to any one else. Lord *St. Leonards*, in the third edition of his Vendors and Purchasers, published in 1826, treats the question, which he says had formerly been a considerable one, as having been set at rest by *Howard* v. *Ducane* (1), and refers to the refusal of the House of Lords to pass a bill for confirming such sales, on the ground that by so doing they would have thrown a doubt upon the law. From 1826 till now I am not aware of any attempt having been made to unsettle the law on this point. The ground of the rule is, that the power of consenting to or requesting an exercise of the power of sale is given to the tenant for life for his own benefit, and that he is not in a fiduciary position as to it. He has therefore the same right to buy from the trustees that any one else has. Then it was said that the sale of the first property was improper, because it was preceded by a negotiation for an exchange with Lord *Balcarres*. This negotiation went off in consequence of conveyancing difficulties. It is not alleged that they were suggested as sham difficulties; they appear to have been suggested *bonâ fide*, and to have really existed. They made it impossible to carry the proposed exchange into effect, and it accordingly failed. Here there is a new starting-point. The tenant for life says: "I want to accommodate Lord *Balcarres*, and I propose to buy the property which you intended to give in exchange." I am not aware of any rule, Act of Parliament, or decision that if a person is otherwise entitled to buy from his trustees he cannot buy, because his motive is to give a benefit to somebody else, though he gives a fair price to the estate. He may say: "I want to employ it in a building speculation," or "I want to give it for a church." I know of no rule that such motives make the transaction improper. If the property is sold at a fair price, the purchaser's motives for buying it cannot affect the case.

It was further urged that the tenant for life had knowledge of circumstances affecting the value of the estate which he ought to have communicated. Possibly—indeed, I may say probably—a tenant for life purchasing part of the settled property may not

(1) T. & R. 81.

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be in the same position as a stranger as to the obligation to communicate what he knows. He may, by reason of his peculiar opportunities of obtaining information, be under some obligation to communicate circumstances which he knows, and which he knows that the trustees do not know. Now, it is said that he, *Scarisbrick*, had agreed with *Part* for a lease of the mines under this property, along with other mines, and that he did not communicate this to the trustees. If his having entered into that agreement shews that the mines were being developed, and he concealed it, he concealed something which increased the value of what he was giving up, for as tenant for life, unimpeachable for waste, he would have had the profits of the mines during his life. So it seems to me that this cannot be urged against him. [His Lordship then examined the evidence that the sale was at an undervalue, and stated it to be insufficient.]

As to the other property, there was a similar negotiation for an exchange, which failed owing to the same conveyancing difficulties. The tenant for life then says: "I will buy, and then effect the exchange, which will give an access to the mines under the settled estate." It is said then that he was bound to give that right of access for the benefit of the persons entitled in remainder to the settled estate. I am of opinion that he was not. There was no misrepresentation as to access being obtained, and, of course, the only way of making such access available was to include a way-leave in the lease of the mines; and if the tenant for life had, during his life, granted a lease of the mines, of course he would have included in the lease a right of access, which would thus have enured to the benefit of the settled estate. This, however, is only a question of motive, and the motive is immaterial if the purchaser gave a fair price, there being no allegation of any improper motive on the parts of the trustees.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Ever since *Howard* v. *Ducane* (1) it has been considered as settled law that a sale cannot be impeached merely on the ground that the purchaser is a tenant for life whose consent was requisite to the sale, and we should be doing wrong if

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we were to throw the slightest doubt upon it. The tenant for life being in no sense a trustee for the remaindermen, what ground is there for impeaching this sale? It is said, because it was in contemplation that there should be an exchange, and the sale was in substitution for it, therefore the exchange should be carried out. In each case no doubt the tenant for life intended *bonâ fide* to effect, if possible, an exchange under the power. The lawyers raised doubts apparently *bonâ fide*. It is extraordinary that when the scheme of an exchange was given up, because it could not be carried into effect, we should now, because it happens to be beneficial to the parties entitled in remainder, be called upon to say that an exchange must be carried out. The parties did not intend an exchange; so, unless undervalue be shewn, the Plaintiff has no case. The evidence does not, to my mind, shew that there was undervalue. It is said that no valuation was made; but the trustees had bought the property only a few years before. They sold it at a slight advance in price. There is no suggestion that the property had in the meantime risen in value, and I think the trustees were justified in dispensing with a valuation. No witness comes forward to say, "I know the value of mines in the neighbourhood, and I say that this property would have fetched in 1851 more than was given for it." The speculative evidence which has been given of the value of the mines is no evidence of what they would fetch in the market. We want to know something more than that somebody has agreed to give a certain rent for these mines along with other mines. Before any opinion can be formed from that, we must know the solvency of the tenant, the prospect of the mines being worked at a profit, and the prospect of that part of the demised mines being worked within any reasonable time. It is said that the existence of this lease was not communicated, but there is no evidence to shew that it was not; and the trustees being dead, it lies on the person relying on the fact of non-communication to prove it. For anything we can tell, the mines may have been carefully valued when the trustees bought. The burden of proof is on the Plaintiff, and he has failed to discharge himself of it. It is then urged, as to the second property taken in exchange, that the tenant for life represented that it was desirable to get it, as it would furnish access to a railway to

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the mines under the settled estate. Was this a representation by the tenant for life that if he bought this estate, and the estates afterwards became separated, the settled estates should have a way-leave? Could anybody concerned in the transaction suppose that, because he said that the acquisition of this property would give access to the mines, he meant to pledge himself to give a perpetual way-leave for the benefit of the remaindermen, who might be distant relatives, and that without receiving any consideration for it? Representations must be construed with reference to the circumstances present to the minds of all the parties when they are made. Mr. *Scarisbrick* was tenant for life, so that there would be immediate access. He might have children; and if he had had any, in all probability there would have been access for ever. Looking at these circumstances, no one could understand him to mean more than that, in the ordinary course of things, there would be access. What he said was merely a true statement of facts, and did not involve any representation which he was bound to make good to the extent now sought.

Solicitors: Messrs. *Ward, Mills, & Witham;* Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Walters, Young, & Co.*

L. JJ. 1870 *Nov.* 16, 17.

FORESTER *v.* READ.

Scandal—Irrelevant charges of Fraud—Costs.

A Plaintiff, in a bill to enforce against the Defendant an alleged agreement for the compromise of claims of the Plaintiff against the Defendant in respect of certain accounts, charged the Defendant with various frauds in respect of the accounts, such alleged frauds being the ground of the claims included in the compromise. The Plaintiff having failed in proving the agreement, and his bill being dismissed with costs, he was ordered to pay the Defendant's costs so far as they had been increased by the irrelevant charges of fraud as between solicitor and client.

12 Eq 439. 441, 11 Ch D. 9.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Stuart*, ordering that all accounts and disputes between the Plaintiffs and the Defendant should be settled on the terms of an agreement alleged in the bill, and ordering the Defendant,

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among other things, to pay the sum of £1000 to the Plaintiffs, and to pay the costs of the suit.

The Defendant had been the confidential agen of the Plaintiffs, and manager of property in *India* belonging to them. The Plaintiffs, in 1867, revoked his appointment, and shortly after this he left *India*. On his coming to *England* the Plaintiffs made various complaints of defaults by him as their agent, the nature of which complaints is shewn in the 7th and 8th paragraphs of their bill, which are mentioned below. In August, 1868, negotiations were entered into for settling all disputes. The conclusion to which the Court came upon the evidence was that, at an interview between the Defendant and the Plaintiffs' solicitor on the 21st of August, all the terms of a compromise were verbally agreed upon except that as to the payment of £1000, which was to be made by the Defendant. He (the Defendant) only acceded to it upon the terms of time being given him for the payment. On the 24th of August the solicitor wrote to the Defendant, recapitulating the terms which had been agreed upon, which included the delivery up of all accounts and documents relating to the property, and stating that the Plaintiffs had consented to the £1000 being paid by two instalments of £500, one at the end of two months and the other at the end of a year. The Defendant replied on the 11th of September, acceding to this, but introducing what the Court considered to be a new term, viz., that the Defendant, as soon as he had fulfilled the terms, should have a full release. This was not agreed to, disputes arose, and the Defendant ultimately refused to carry into effect the terms proposed. The Plaintiffs then filed their bill, praying in substance for the carrying into effect the terms contained in the letter of the 24th of August, and offering to execute a release upon those terms being fulfilled. The bill insisted that a concluded agreement for compromise had been come to before the 24th of August, on the terms contained in the letter of that date, and the relief prayed for proceeded solely on the footing of there being such concluded agreement. The bill, however, in the 7th and 8th paragraphs, which followed the statements as to the nature of the Defendant's employment and position, contained charges of gross misconduct against the Defendant—as that he had kept two sets of accounts, one for

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himself and the other for the Plaintiffs, making the latter much less advantageous to them; that he had suffered a palace and pleasure-grounds, which formed part of the estate, to fall into dilapidation, though he charged large sums in his accounts for keeping them in repair; that he had cut down and sold timber, and not accounted for the proceeds; that he charged the Plaintiffs for a large number of servants as kept in the palace, many of whom were not kept at all, and others were kept by the Defendant at his own house, 130 miles off; that he had retained to his own use about half of certain donations which the Plaintiffs directed him to make to their servants; that he had carried away and appropriated part of the furniture of the palace; and that he had purchased in his own name an estate with the Plaintiffs' money, and retained it as his own property; that the loss to the Plaintiffs, by reason of the wrongful conduct of the Defendant, so far as the accounts had been investigated, appeared to amount to several thousand pounds, and that further defalcations were from time to time discovered as the investigation proceeded. The Defendant denied these allegations by his answer.

Mr. *Dickinson*, Q.C., and Mr. *Caldecott*, for the Appellant.

Mr. *Karslake*, Q.C., and Mr. *Millar*, for the Plaintiffs.

SIR W. M. JAMES, L.J., said that the letters of the 24th of August and the 11th of September did not constitute a contract, inasmuch as the latter was not a simple acceptance of the terms in the former, but introduced a new term, the executing of a general release, which could not be looked upon as a mere matter of machinery, but, under the circumstances, was material, since the Defendant was to part with all his papers. His Lordship then proceeded to examine the evidence as to the existence of a concluded parol contract, and stated his conclusion to be that no concluded agreement had been come to, and that as the bill was wholly based on the supposed agreement, and sought no relief but on the footing of such agreement, it ought to have been dismissed with costs.

[His Lordship then continued:—]

The costs, so far as they have been increased by the allegations in pars. 7 and 8 of the bill, and the evidence relating to

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them, whether adduced on the part of the Plaintiff or of the Defendant, must be paid by the Plaintiffs as between solicitor and client. All that was required to be stated in the bill on the subject was, that there were disputes between the Plaintiffs and the Defendant as to the Defendant's accounts. The allegations that, as a matter of fact, the Defendant had been guilty of the frauds with which those paragraphs charge him, ought not to have been introduced into the bill, since the question whether the Defendant had been guilty of those frauds was wholly irrelevant to the sole issue in the bill, which was, whether he had entered into a binding agreement for settlement of the disputes which had arisen. To introduce these charges was a display of feeling which ought not to find a place in the pleadings of a court of justice, and if the Defendant did, as was stated, write an offensive letter before the institution of the suit, that is no excuse for bringing such matter on the records of the Court. As, however, the Plaintiffs thought fit to make allegations so seriously affecting the Defendant's character, the Defendant, however irrelevant they might be, was entitled to deny them on oath.

SIR G. MELLISH, L.J., gave judgment to a similar effect on the main question in the case, and expressed his concurrence with the Lord Justice *James* as to the form of the order.

Solicitors: Messrs. *Jones & Blaxland;* Mr. *E. S. Cavell.*

In re NATAL INVESTMENT COMPANY.

L. JJ. 1870 *Nov.* 3.

NEVILL'S CASE.

Winding-up—Compromise with Contributory in Class A.—Past holder of Shares.

A. N., a contributory, who was a holder of shares at the date of the winding-up, being unable to pay the calls, an agreement was entered into under the sanction of the Court, by which certain sums of money and a transfer of all the contributory's interest in the company, were to be accepted by the liquidator in full discharge of all claims against the contributory. The agreement contained a stipulation that nothing therein contained should prejudice the

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right of the company, or of its liquidator or creditors, against any other contributories of the company, whether as present or past members thereof, or otherwise. After this a list of contributories or past members was made out, and the name of *H. N.*, a former holder of *A. N.*'s shares, was placed on the list of contributories as a past member :—

Held (affirming the decision of the Master of the Rolls), that the compromise with *A. N.* did not take away the liability of *H. N.* to the company, and that *H. N.* was rightly placed on the list as a past member.

THIS was an appeal motion from a decision of the Master of the Rolls, refusing to remove the name of the Appellant from the List B of contributories of the *Natal Investment Company, Limited*, on which he had been placed as a past member of the company.

The Appellant, *Henry W. Nevill*, was an original holder of fifty shares. In September, 1866, he duly transferred these shares to *Alfred Hooper Nevill*, who was thereupon registered as owner. On the 11th of January, 1867, the company stopped payment, and shortly afterwards a resolution was passed for a voluntary winding-up, which was continued under supervision. *Alfred Nevill* was settled on the list as a present member.

The liquidator made a call of £15 per share, payable on the 1st of October, 1867. *Alfred Nevill* made default in payment of this call, and also of a subsequent call of £20 per share, and thus became indebted to the amount of £1750. Being unable to pay, he proposed a compromise, and, with the sanction of the Judge in Chambers, the matter was compromised on the terms embodied in an agreement of the 19th of June, 1869.

This agreement recited that *Nevill* had been settled on the list of contributories in respect of fifty shares, and that there was then due from him to the company £1750 for the two calls ; and that he had proposed to pay to the liquidator £100 by way of compromise and in satisfaction and discharge of the said sum of £1750, and of all liability whatsoever as a contributory of the company ; and that the liquidator having investigated the affairs of *Alfred Nevill*, and, believing that such compromise would be beneficial to the company, had, in exercise of the power given to him by the *Companies Act*, agreed to accept the same, subject to the sanction of the Judge ; and reciting that *Nevill* had paid to the liquidator the £100, and also £60 for costs, it was agreed : 1. That the liquidator should, before the 30th of June, apply to

the Judge to sanction the agreement. 2. That, upon the agreement being sanctioned, *Nevill* should do and execute all such acts and deeds as might be necessary for transferring or surrendering and releasing to the liquidator, on behalf of the company, or in such manner as the Judge might direct, the shares of him, *Alfred Nevill*, in the company, and all claims and demands whatsoever which he had or might have against the company in respect of the shares or the distribution of the assets of the company, or otherwise. 3. That the two sums of £100 and £60, and the transfer or release of the shares and the interest of *Alfred Nevill*, should be accepted by the liquidator as and be deemed to be taken to give to *Alfred Nevill* a full discharge of all claims of the company or the liquidator against him as shareholder and contributory. Clause 4 provided for the event of the Judge not sanctioning the agreement. Clause 5 provided for what might be done if *Nevill* failed to perform his part of the agreement, and the instrument ended with the following proviso:—

"Provided always that nothing herein contained shall in anywise prejudice or affect the right of the said company, or of the liquidator or the creditors thereof, against any other contributories of the said company, whether as present or past members thereof, or otherwise; and that the liability of such members to contribute to the assets of the said company shall remain the same as if this agreement had not been made, except only to the extent of the said sum of £100, the amount of compromise so paid as aforesaid."

The Appellant was in no way privy to the above compromise.

At the latter end of July, 1869, the Appellant received a notice from the liquidators of the appointment of a day for settling the list of contributories in Class B, informing him that his name was included therein in respect of the fifty shares. The Appellant applied to the Master of the Rolls to have his name struck out, and this application, having been adjourned into Court, was refused with costs.

Mr. *Higgins*, for the Appellant:—

The Appellant was merely in the position of surety for the transferee for one year, and the liquidator, having made this bargain with the principal debtor, cannot come against us. The

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case is like *Webb* v. *Hewitt* (1), for the transferee gave up his interest in the assets, which might have been something valuable if the winding-up had resulted prosperously. This takes the case out of the ordinary rule as regards a release with a reservation of rights against the surety, even if there be such a reservation here, which I submit there is not, the final clause probably meaning nothing more than that in settling Class B the objection was not to be taken that Class A had not been exhausted.

[The LORD JUSTICE JAMES :—Do not the last words apply to the Appellant ?]

I submit they mean only that this £100 is not to be paid over again by Class B. If the Appellant is to be on the list, he has no remedy against *Alfred Nevill.* He cannot bring a suit or action, for all equities and rights must be worked out in the winding-up : *Companies Act,* 1862, sects. 38, 102, 109, 133 ; so, if the Appellant has to pay, he has no means of claiming indemnity from the transferee but through the liquidator, who has released the debtor, and therefore cannot do anything.

Mr. *Fitzroy Kelly,* for the liquidator, was proceeding to contend that the case was not one of principal and surety, but of statutory liability, when he was stopped by the Court.

SIR W. M. JAMES, L.J. :—

This appears to me a reasonably plain case. An arrangement is made with a contributory in Class A, by which the liquidator accepts a certain sum and a transfer of all the contributory's rights in the company as a consideration for not making any further claim against him in respect of the shares of which he was the holder at the commencement of the winding-up ; but in this agreement the liquidator in substance says expressly, I do not mean to release anybody else. It is impossible to read the proviso without seeing that it was principally directed to the transferor. There is nothing unfair in this. The contributory in Class A cannot be further troubled by the liquidator, but he remains liable to the contributory in Class B, if the latter is called upon to pay the

(1) 3 K. & J. 438.

amount which the contributory in Class A failed to pay. Probably the transferee preferred remaining liable to the transferor for what the transferor should pay, to being called upon directly by the liquidator. There is nothing to induce us to say that this agreement ought not to be carried into effect according to its terms, or that it has any effect in releasing the Appellant. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The question turns upon the construction of the agreement. Was it the intention that the transferor should be discharged as well as the purchaser? Clearly I think not, for the agreement says so in plain terms. Then, is there anything to prevent that agreement from having effect given to it according to its terms? It is clear that, even where the principal debtor is released by a formal instrument under seal, if the remedy against the surety is reserved the surety can be sued. The reason why a simple release of the principal debtor discharges the surety is, that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the principal debtor.

12 Eq 6

Solicitors: Mr. *T. A. Lee*; Messrs. *Stevens, Wilkinson, & Harries.*

L. JJ.
1870
Nov. 15.

In re BOSWORTHEN AND PENZANCE MINING COMPANY.

JONES' CASE.

Contributory—Fully paid-up Shares—Subscriber of Memorandum.

The memorandum of association of a company was subscribed by *A.* for 250 shares; and by the articles of association it was declared that the company should be at liberty to adopt an agreement for the purchase of certain mines from *A.* and another, who were to be paid partly by 500 fully paid-up shares. The agreement was adopted, and the vendors were entered in the register as holders of 250 fully paid-up shares each:—

Held, that *A.* must be considered as a holder of fully paid-up shares, and not as an ordinary contributory.

THE *Bosworthen and Penzance Mining Company* was registered on the 29th of August, 1866, in the Court of the Vice-Warden of the Stannaries. By the memorandum of association it was stated that the objects for which the company was established were, amongst other things, the purchase of certain mines; and the persons whose names were subscribed stated that they were desirous of being formed into a company, and agreed to take the number of shares in the capital set opposite to their respective names. Amongst the subscribers were *J. F. Taylor* for 250 shares, and *Thomas Jones* for 250 shares of £10 each. By the articles of association it was agreed that the company should be at liberty, if and when the directors thought fit, to adopt and confirm a certain agreement for the sale of mines dated the 2nd of August, 1866, and made between *Taylor* and *Jones* of the one part and *W. T. Ranson* of the other part; and that the 500 shares to be taken by the vendors pursuant to the agreement should be entitled to dividends proportioned to the full amount considered to have been paid up thereon. By the above-mentioned agreement it was, amongst other things, agreed that *Taylor* and *Jones* should sell certain mines and plant to one *Ranson* on behalf of the then proposed company; that the consideration should be £8450, and that £5000 part thereof should be paid by an allotment or transfer to the vendors of 500 fully paid-up shares of £10 each in the company, and the sum of £3450 in cash, by instalments.

The contract appeared to have been confirmed at a meeting of the directors, of whom *Jones* was one; and the company carried on mining operations for about a year. An order for winding up the company was made on the 15th of October, 1867, the principal creditors being *Taylor* and *Jones*, for unpaid purchase-money.

The register of shareholders of the company was not made evidence, but was produced in Court; and in it *Taylor* and *Jones* each appeared as a holder of 250 shares fully paid up.

In the list of contributories *Jones* and *Taylor* had been entered as holders of fully paid-up shares; but the Vice-Warden of the Stannaries, on an application to him, directed the list to be rectified, and *Taylor* and *Jones* to be placed on the list as ordinary shareholders for 250 shares each.

Taylor and *Jones* both appealed, but only the appeal of *Jones* was argued.

Mr. *Chester*, for the Appellant, referred to *Forbes & Judd's Case* (1), *Drummond's Case* (2), *Pell's Case* (3), and *In re Baglan Hall Colliery Company* (4).

Mr. *De Gex*, Q.C., and Mr. *Lindley*, for the official liquidator:—

This case is completely covered by *Migotti's Case* (5). It must be shewn that the shares held by *Jones* are the same as those which he was to take as fully paid, and that the creditors knew it; and on these points there is no evidence. *Jones* has held himself out as the owner of these shares, and they must have supposed that he had paid for them. It may be true that he appears on the register as a holder of paid-up shares, but he was a director, and it was his duty to keep the register right. Unless it is from the register, there is no evidence that he had paid for the shares in land or in any way.

SIR W. M. JAMES, L.J.:—

In this case I am not sure that, in the absence of decisions, I should not have felt myself bound, as a matter *strictissimi juris*, to come to the same conclusion as the Master of the Rolls in *Pell's*

(1) Law Rep. 5 Ch. 270.
(2) Ibid. 4 Ch. 772.
(3) Law Rep. 5 Ch. 11.
(4) Ibid. 346.
(5) Law Rep. 4 Eq. 238.

BIBL. ...DIN ...EY.

L. JJ. 1870 JONES' CASE.

Case (1). I say *strictissimi juris*, for though it might be according to the words, it would be contrary to the intention of the parties.

It is quite possible that the contract to take the shares and the contract to take the land might relate to different shares, but I cannot find any trace of a distinction between this case and *Pell's Case*, except one, which is in favour of the present Appellant; for in *Pell's Case* the number of shares did not exactly agree, as in this case. Here the memorandum of association states Mr. *Jones* to be the holder of 250 shares, and the articles shew that Mr. *Jones* and Mr. *Taylor* were vendors, and that the company was to pay them partly in paid-up shares, that is to say, shares treated as paid up.

When they came to carry this into effect, they seem to have done it by entering these gentlemen as owners of 250 shares each, and it seems to have always been considered that these 500 shares were the same as those mentioned in the agreement. There is no ground to distinguish this case from *Pell's Case*, and as it was the obvious meaning of the parties, I am glad to decide in the same way.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and I do not feel the same doubt on the subject which the Lord Justice has felt. I quite agree with the Lord Justice *Giffard*, and I think that *Pell's Case* was rightly decided, and must govern this case.

It is important to see what these gentlemen have really signed [His Lordship read part of the memorandum of association]. They enter into an agreement to take 250 shares each, and bind themselves to pay fully for those shares. And they have paid fully, for they have given land, which is as good as money; and I cannot see how a different conclusion can be come to unless there is some reason to suppose that they intended to take 500 shares each; that is to say, 250 to be paid for in land, and 250 in some other way.

The memorandum and the articles shew the manifest intention of all parties that there should be only one set of shares. In the

(1) Law Rep. 8 Eq. 222.

L. JJ.
1870
JONES' CASE.

articles they are described as shares to be taken for the land, and it would be most unjust to hold these gentlemen liable to pay for 250 shares in any other way.

I cannot see that they held themselves out to the world or to the creditors of the company as liable on these shares. The only difference between this and *Pell's Case* (1) is, that the agreement here is conditional, but there could be no doubt that it would be adopted on the first time that the directors met. The company have the land, but *Jones* and *Taylor* might have sold the land, and with the purchase-money they might have paid upon the shares; and there is no difference between money and land in such a case.

My opinion is, that the name of this gentleman ought to be struck off the list of ordinary contributories.

Solicitors: Mr. *H. Fryer*; Messrs. *Gregory, Rowcliffes, & Rawle.*

In re HODGES' DISTILLERY COMPANY. *Ex parte* MAUDE.

L. JJ.
1870
Nov. 25.

Winding-up—Distribution of surplus Assets—Fully paid-up Shares.

By the articles of association of a company the directors were authorized to declare a dividend to be paid to the shareholders in proportion to the number of their respective shares and the amount paid up thereon respectively; and in the prospectus it was stated that the directors reserved power to issue 1000 fully paid-up shares, which were issued accordingly. The shares were of £25, on which the whole £25 was paid by some shareholders and only £20 by the others. Dividends had been paid to the shareholders on the amounts so paid by them respectively:—

Held, that, in the distribution of the surplus assets of the company after winding-up, the holders of fully paid-up shares were entitled to receive £5 a share before the assets were divided.

Order of *Malins*, V.C., reversed.

17 Eq 490-3

IN 1865, *Hodges' Distillery Company, Limited*, was formed, with a capital of £200,000, in £25 shares. Among the articles of association of the company were the following:—

"Art. 22. The company may, if the directors deem it expedient

(1) Law Rep. 5 Ch. 11.

L. JJ.
1870
In re HODGES' DISTILLERY COMPANY. *Ex parte* MAUDE.

so to do, receive from any of the shareholders willing to advance the same, all or any part of the moneys due upon their respective shares beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as may from time to time exceed the amount of the calls then made upon the shares in respect of which such advance shall have been made, the company may pay such interest as may be agreed upon between the shareholders paying such sum in advance and the directors."

"Art. 114. The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to the number of their respective shares and the amount paid up thereon respectively."

No other provision was made in the articles as to shares on which more might be paid than had been called up; but in the prospectus of the company it was stated that the directors reserved to themselves power to allot 1000 shares fully paid up. Mr. *Maude* applied for twenty of these shares, which were allotted to him, and he paid up the whole £25 on each. Altogether, 1121 fully paid-up shares and 5274 ordinary shares were issued, on which last £20 only was paid; also five preference fully paid-up shares were issued.

The company carried on business for some time, and dividends at the rate of 7 per cent. on the capital paid up were from time to time paid until the 31st of December, 1866, Mr. *Maude* receiving dividends at that rate on the full sum paid by him.

In 1869 an order was made for winding up the company. The assets had been sufficient to pay all the debts, and there remained a surplus for division amongst the shareholders.

Mr. *Maude* claimed, for himself and for the other holders of paid-up shares, to have £5 a share, and interest thereon, paid in the first place out of the assets.

The Vice-Chancellor *Malins*, before whom the matter came upon an adjourned summons, held that the assets must be divided amongst the shareholders in proportion to the amounts paid up by them (1).

(1) 1870. Aug. 2.

SIR R. MALINS, V.C., said that he did not think the question at all clear. There was certainly an agreement by each shareholder to pay £25; but it was implied that the payment was to be made

Mr. *Maude* appealed.

Mr. *Cotton*, Q.C., and Mr. *Higgins*, for the Appellant.

Mr. *Lindley*, for the official liquidator, mentioned the cases of *In re Anglesea Colliery Company* (1); *In re Scinde, Punjaub, and Delhi Corporation* (2); *In re Holyford Mining Company* (3); but took no part in the argument.

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only if that sum was required for the purposes of the business, or for adjusting the rights of the holders. But if the shareholders had agreed to incur risk according to the amounts paid up by them, that agreement would bind them. Mr. *Maude* might have said he would take interest under Art. 22; but His Honour thought that Mr. *Maude* came under Art. 114, which clearly contemplated unequal amounts being paid up by different shareholders, and gave them the option of taking a dividend on the sum advanced. Mr. *Maude* had received a profit on the whole amount, and it was but ordinary justice that he should bear the losses in the same proportion. That would be the case in an ordinary partnership, and there was no difference in principle between that case and the case of a joint stock company. There were no equities to be adjusted between the different shareholders, and His Honour thought that the assets were divisible amongst the shareholders in proportion to the amounts paid by them on their shares.

(1) Law Rep. 2 Eq. 379; 1 Ch. 555.
(2) 1866 Feb. 22 V.-C. S.

In re SCINDE, PUNJAUB, AND DELHI CORPORATION.

THIS corporation was constituted in December, 1862, under the provisions of the *Companies Act*, 1862. The original capital was £1,000,000, in 50,000 shares of £20 each.

In compliance with the provisions of the articles of association the directors, in December, 1862, in the first instance issued only 25,000 shares. These shares were called the first issue. In October, 1863, the directors issued 12,500 shares, called the second issue. On these 37,500 shares £10 per share had been called, and paid up by the holders. In August, 1864, of the remaining 12,500 shares the directors issued 896, and on them £5 per share was called up. On the 26th of February and the 23rd of March, 1866, a resolution was passed and confirmed to wind up the corporation voluntarily, and liquidators were appointed. At the date of such resolution the paid-up capital amounted to £418,251. All the debts and liabilities of the corporation had been discharged, and a balance of £215,000 now remained in the hands of the liquidators, and was applicable for distribution among the shareholders, and it was expected that the remaining assets would produce on realisation the sum of £53,000, making together the sum of £268,000 for such distribution. The Petitioner, *William Patrick Adam*, was a holder of 300 shares of the third issue, on each of which he had paid £5, and this was a Petition on behalf of himself and all other holders of third

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(3) Ir. Law Rep. 3 Eq. 208.

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In re HODGES' DISTILLERY COMPANY. *Ex parte* MAUDE.

Mr. *Glasse*, Q.C., and Mr. *Bedwell*, for a large ordinary shareholder, who had leave to attend:—

Mr. *Maude* does not come in under Art. 22 as a shareholder who has made an advance. By his bargain he was entitled to a dividend on the whole of his £25, whilst we had ours on £20, and he must bear the loss in the same proportion. There was no contract to call up the whole £25, and he took his chance. *In re Anglesea Colliery Company* (1) is the only decided case which has any bearing on this, and reliance was there placed on the circumstance that there was no contract to share profits and losses in proportion to the money paid up. The ordinary course is to pay a dividend at so much a share, and to treat any other money as an advance; and Art. 114 in this company provides that the profit, and of course the loss, shall be irrespective of the amount paid up. Those who took shares with less paid up were content with smaller profits, and ought to bear a smaller loss. The case might have been different if all the money had been called up, but the directors had no right to make calls unnecessarily; there was no necessity for a call here, and the shares must be dealt with as they stand. Mr. *Maude* might have gone on receiving a large dividend for

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issue shares, praying for a declaration that the assets of the corporation, which should remain after full payment and discharge of all the debts and liabilities were distributable among the shareholders rateably in proportion to the amount of the capital called up and paid by them respectively, and that the liquidators might be ordered to distribute the surplus assets of the corporation among the shareholders in conformity with such declaration.

Mr. *Bacon*, Q.C., Mr. *C. T. Simpson*, and Mr. *Conybeare*, for the Petitioner, contended for a rateable distribution.

Mr. *Greene*, Q.C., and Mr. *Cracknall*, for Mr. *Huggins*, a holder of shares of the first and second issues, contended that the surplus assets of the corporation should be applied first in payment of £5 per share to the holders of the first and second issues; and that after all the shares were equalised by such payment the residue of the surplus assets ought to be divided equally among all the shareholders.

Mr. *Marten*, for the liquidators.

The VICE-CHANCELLOR declared that the liquidators must apply the surplus funds in their hands, first, in repaying £5 per share to the shareholders who had paid £10 per share, and next in distributing the balance rateably amongst all the shareholders who had paid up the calls on their shares. The cost of all parties on this Petition would be paid by the liquidators out of the funds in their hands.

Solicitors: Messrs. *Thomas & Hollams*; Messrs. *Clarke, Son, & Rawlins*.

(1) Law Rep. 2 Eq. 379; 1 Ch. 555.

12 Jan 1696

twenty years, and when losses came might, if his contention is sound, evade them.

Mr. *Cotton*, in reply.

SIR G. MELLISH, L.J.:—

This is an application by a shareholder in this company, who has paid up the full amount of his shares, that in distributing the assets of the company he may be repaid the £5 which he has paid upon each share above what other shareholders have paid, before the surplus assets are divided.

The real question appears to be how the losses of the company ought to be borne. Ought they to be borne in proportion to the amount which happened to be paid up by each shareholder at the time when the winding-up order was made, or ought they to be borne in proportion to the subscribed capital, whether the shares happened to be fully paid up or not?

In my opinion, the surplus ought, according to the true construction of the Act, and of the articles of association of this company, to be distributed so as to divide the losses equally among the two descriptions of shareholders.

The effect of the *Companies Act*, 1862, on companies of this nature is unquestionably to make the losses in certain cases proportionate to the subscribed capital. Suppose a simple case, that the assets in hand left exactly the sum unprovided for which would be obtained by calling up the remaining £5. No doubt, the proper mode of paying the debts would be to call up the £5, and in this way the loss would be provided for. That would be a case where the entire capital was lost, and there, no doubt, the fully paid-up shareholders and the partly paid-up shareholders would all be on an equality.

The question, then, is, whether the true meaning of the Act is not that this shall be the rule generally, and whether there are any provisions in the articles from which a contrary inference should be drawn:—[His Lordship then stated the facts.]

In my opinion, the 22nd article has no bearing on this case, for it does not appear that Mr. *Maude* agreed to advance any money;

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but he applied for paid-up shares, they were allotted to him, and he paid the whole amount, not treating it as an advance, but as on paid-up shares. He did not agree to receive interest, but to be a shareholder with the whole amount paid up, and to receive dividends accordingly. Then the 114th article provides:—[His Lordship read it.]

Now, the entire question is, whether it is to be inferred that, because by the particular provisions of these articles the dividend is to be in proportion to the amount paid up, therefore, if the company is wound up, the losses are to be proportional to the amount paid up. In my opinion, we cannot draw any inference from Art. 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that in case of the company being wound up the losses should be divided in proportion to the amount paid up, and not to the amount subscribed.

If we go to the analogy of an ordinary partnership, the losses are to be divided in proportion to the amounts which the partners have agreed to pay, and it makes no difference that some portion of the capital may not have been called up, if the partners are liable to have it called up. If one partner had paid up £10,000, and the other had agreed that, if that was lost, he would pay up £10,000, that would afford a strong inference that the losses were to be divided equally between them.

If any other construction were adopted, it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately realised, or whether it was necessary to make a call in order to pay the debts. If the £5 per share had been called up to pay pressing debts, it could not be denied that the assets, when got in, would be divided *pro ratâ;* that is to say, the losses would be borne by the shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realised, or that the creditors did not press for payment, so that a call was not necessary before the assets were divided; but that accident ought not to alter the way in which the assets are to be divided.

In many cases a considerable portion of the shares is expended in

buying that which is the foundation of the company; and when the company is wound up it would be very unjust that the person who had been paid for his property in shares should have to bear the losses, and that none of the losses should fall on the other shareholders.

The cases cited, *In re Anglesea Colliery Company* (1) and *In re Scinde, &c., Corporation*, support the conclusion we have arrived at. In the case of *In re Holyford Mining Company* (2) a contrary conclusion was come to, but under very special circumstances; and, as I collect, the decision of the Court would, in the absence of those circumstances, have been different.

It appears to me that this application ought to have been granted, and that the applicant is entitled to £5 a share, before the assets are divided, but without interest.

SIR W. M. JAMES, L.J.:—

In this case we are distributing the assets according to the equities of the parties concerned; and equity must consider that done which ought to have been done. If the calls had been made the shareholders would have been upon an equality, and none ought to be at a disadvantage because the calls were not made.

Solicitors: Mr. *H. A. Maude;* Mr. *J. Holmes;* Messrs. *Meyrick, Gedge, & Loaden.*

(1) Law Rep. 2 Eq. 379; 1 Ch. 555. (2) Ir. Law Rep. 3 Eq. 208.

12 June 1896

L. JJ.
1870
Nov. 4.

Ex parte ISAAC. *In re* DE VECCHJ.

Bankruptcy—Liquidation by Arrangement—Petition by one Partner—Injunction to restrain Action against the Firm—Lord Mayor's Court—Bankruptcy Act, 1869, *ss.* 13, 125—*Gen Ord. Bkcy.*, 1870, *Rule* 260—*Appeal—Admission of fresh Evidence.*

Where one partner of a firm files a petition for liquidation by arrangement under the 125th section of the *Bankruptcy Act*, 1869, the Court has no jurisdiction to restrain an action by a creditor of the firm against all the partners.

The Court has power to grant an injunction under the 13th section of the *Bankruptcy Act*, 1869, on the application of the receiver under a liquidation by arrangement, before a trustee has been appointed.

The Court will refuse to permit fresh evidence to be used on an appeal if the party tendering it had the opportunity of using it in the Court below, but omitted to do so.

THIS was an appeal from an order made by Mr. Registrar *Hazlitt*, sitting as Chief Judge in the *London* Bankruptcy Court.

On the 22nd of August, 1870, Mr. *W. Isaac* commenced an action of attachment in the Lord Mayor's Court against Messrs. *De Vecchj, Navone, & Co.* for a debt of £400, alleged to be due from that firm to him, and lodged an attachment for that amount on certain goods of the firm in the hands of Messrs. *Gandell*, who were garnishees in the action.

On the 26th of October, *Silvio Eugenio de Vecchj*, a member of the above-named firm, filed a separate petition for liquidation under the 125th section of the *Bankruptcy Act*, 1869, and Mr. *J. A. Josolyne* was appointed receiver of the property of the Petitioner.

On the 28th of October, the receiver gave notice of motion in the Court of Bankruptcy, to restrain *Isaac* from proceeding with his action against Messrs. *De Vecchj, Navone, & Co.* in the Lord Mayor's Court.

Notwithstanding this notice, *Isaac* proceeded to trial in the action, and obtained a verdict against the goods in the hands of the garnishees. On the 1st of November, before any meeting had been held for consenting to the liquidation or appointing a trustee, the Registrar made an order restraining *Isaac* from taking any

further proceedings in the action in the Lord Mayor's Court against Messrs. *De Vecchj, Navone, & Co.*, and from taking any further proceedings upon the verdict obtained by him in the attachment proceedings in the said action against the garnishees, until the 26th of November. From this order *Isaac* appealed.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the Appellant:—

The order now under appeal was beyond the jurisdiction of the Court. In the first place, no trustee having yet been appointed under the liquidation, the order is made too soon. The 13th section of the *Bankruptcy Act*, 1869 (1), gives power to the Court to grant an injunction at any time "after the presentation of a bankruptcy petition." That is the commencement of the bankruptcy. But the analogous act in a liquidation is not the presentation of the petition for liquidation, but the appointment of a trustee. This is clear from the 125th section, clause 2, which says that "the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee;" and the 7th clause of the same section is to the same effect. It is true that the 260th Rule of the General Order of January, 1870, gives power to the Court to issue an injunction at any time after the presentation of the petition for liquidation; but that rule is inconsistent with the provisions of the statute, and ought not to be acted upon. It was not intended that the receiver should initiate proceedings of this nature. His simple duty is to collect the property.

But our main objection to this order is, that the liquidation being a separate liquidation the Court had no power to restrain an action against the firm of which *De Vecchj* is a member. The

(1) 32 & 33 Vict. c. 71, s. 13: "The Court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt proveable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy or commenced during its continuance, to proceed upon such terms as the Court may think just. The Court may also at any time after the presentation of such petition, appoint a receiver or manager of the property or business of the debtor against whom the petition is presented, or of any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof."

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13th section of the Act speaks of restraining actions "against the debtor," and the 260th rule "against the debtor or his estate." But this action is against the debtor's partner as well as himself, and the goods are not the goods of the debtor, but of the partnership, and his separate creditors have no claim to be paid out of them until the debts of the firm have been satisfied: *Ex parte Anderson* (1). The point was expressly decided in *In re Born*, a case before the Chief Judge on the 20th of April, 1870.

Mr. *Swanston*, Q.C., and Mr. *Bagley*, for the Respondent, tendered in evidence an affidavit by the solicitor for the receiver, which had been sworn before the hearing in the Court below, but had not been used on account of its not having been filed. It appeared that the counsel for the receiver tendered the affidavit in evidence in his reply, and that the Registrar offered to adjourn the case to enable the affidavit to be filed, and to give an opportunity to the other side to answer it, but that the counsel for the receiver declined to accept the adjournment, and the affidavit was accordingly rejected. They now applied to the Court to permit the affidavit, which had been subsequently filed, to be read. They referred to the 147th Rule of the General Order of January, 1870.

Mr. *De Gex*, and Mr. *Reed* for the Appellant, objected to the admission of the affidavit. They admitted the power of the Court of Appeal to permit fresh evidence to be read, but contended that leave was only given where the evidence had been discovered subsequently to the hearing in the Court below, or had been omitted by a mere slip.

Sir W. M. James, L.J.:—We cannot receive this affidavit. We are not sitting as a court of original jurisdiction but as a court of appeal, and it would be very unfair to admit evidence which the opposite party had no opportunity of meeting in the Court below. In the present case the receiver rested his case on his other affidavits, and did not tender this till the close of the argument; and when an adjournment was offered him he made his election to decline it. The application must be refused.

(1) Law Rep. 5 Ch. 473.

SIR G. MELLISH, L.J.:—I am of the same opinion. I think that we ought not to admit a fresh affidavit when the party tendering it had the opportunity of bringing it before the Court below. He might have had an adjournment, but he preferred to take the order on the evidence then before the Court.

Mr. *Swanston*, and Mr. *Bagley*, then proceeded with their argument for the Respondent:—

With respect to the power of the Court to make this order before the appointment of a trustee, the 260th rule is conclusive that an injunction may be granted immediately on the filing of the Petition. The rule is not inconsistent with the Act, and if it were, it would be binding, for the rules have the same force as an Act of Parliament (sect. 78). It has been expressly decided that the words "bankruptcy petition," in sect. 87, include a petition for liquidation: *Ex parte Key* (1).

With respect to the principal point, it is a mere assumption to hold that the words "debtor" and "estate" in the statute and in the rules mean "separate debtor" and "separate estate" only. A debtor who petitions for liquidation has to include his joint as well as his separate creditors (Rule 287), and the joint creditors vote as well as the separate. The separate creditors have an interest in the joint assets as well as the joint creditors, although in a subordinate degree; and if the Court had no power to protect them it would be a defect in the Act. The Court of Bankruptcy has always exercised the power of taking possession of and administering joint assets, if by the consent of the solvent partner or in any other way they come into the hands of the Court: *In re Wait* (2); *Dutton* v. *Morrison* (3).

The 22nd section of the Act of 1869 extends the jurisdiction of the Court by expressly giving it "power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, arising in any case of liability coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

(1) Law Rep. 10 Eq. 432. (2) 1 Jac. & W. 605.
(3) 17 Ves. 193.

L. JJ. 1870

Ex parte Isaac. *In re* De Vecchj.

Sir W. M. James, L.J. :—

In this case the Appellant was, or alleged himself to be, a creditor of two gentlemen, *De Vecchj* and *Navone*, for £400, and availed himself of the process for foreign attachment in the Lord Mayor's Court to attach certain goods which he alleged to be theirs in the hands of Messrs. *Gandell*. These proceedings resulted in an adjudication that the goods were those of the debtor, which, as against the goods in the hands of Messrs. *Gandell*, has made the proceedings complete. When the creditor has obtained this security against the goods of his two debtors, which are taken care of by the law to answer his demands, one of the two debtors proposes to wind up his affairs by liquidation, and for that purpose takes proceedings to call a meeting of his creditors. The Petition is presented in due form, and the debtor obtains a receiver of his estates and effects, and then the receiver applies for and obtains an order to stay the attachment by which the joint goods of both partners have been made a security for their joint debts.

This was done under the 260th rule, which we must take to be an authoritative decision that it is in the power of the Court to entertain these applications immediately after the presentation of the Petition for liquidation. But is this a proper case for granting the application? The 260th rule speaks of actions against the debtor and the debtor's estate. The same question came before the Chief Judge in the case which has been referred to of *In re Born*, where one of the joint debtors had absolutely absconded; and the Chief Judge briefly but clearly expressed his opinion that it was gross injustice to restrain an action by a third party not before the Court. I am of the same opinion. I cannot think that it was the intention of the Act that the Court should exercise so strong and so unjust a power as to interfere with the rights of another person not before the Court. It would require very plain words in a statute to make me assume that the Legislature had any such intention. I can find no such clear words, and cannot imply any such intention. On the same grounds, therefore, as the Chief Judge, I must hold that the order was improperly made, and that it must now be discharged. Several other points were urged in argument, but I prefer to rest my decision on those which I have stated.

SIR G. MELLISH, L.J.:—

The only question which it is necessary for us to decide turns on the true construction of the 13th section of the *Bankruptcy Act*, 1869, and the 260th rule made under that Act, both of which are to the same effect; and the question is, whether the Court of Bankruptcy can restrain an action against a debtor jointly with a third party, because the debtor has filed a Petition for liquidation under the Act. The important words in the section are these: "To restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt proveable in bankruptcy." Does that mean against the debtor alone, or the debtor jointly with some other person? The Legislature would have used plainer terms if they had meant to include an action against a third party. Suppose the partnership to be solvent? Can we imagine that it was intended that a separate creditor should be able to prevent them from paying their debts? And if so, why should a joint creditor be prevented from forcing them to apply their assets in such a manner? On the other hand, suppose the partnership were insolvent, the proper course in that case would be to make the firm bankrupt. It was said that if one partner happened to be abroad a difficulty might occur; but, if so, all that can be said is that it is a case which the Legislature has omitted to provide for. But in ordinary cases, where the members of the firm are in *England*, there would be no difficulty, and the estate could be properly administered. If no such proceedings have been taken against the firm, as in the present case, we must conclude that the partnership is solvent.

It is to be observed that the order does not profess to restrain proceedings against *De Vecchj* individually, but the proceedings in the Lord Mayor's Court, which are against both parties. I can well conceive proceedings being taken against both debtors which might be restrained against one debtor, leaving the action to go on against the other; but in the present case that is impossible. The order therefore must be discharged. The Appellant will have the costs in the Court below, but not the costs of the appeal.

Solicitor for the Appellant: Mr. *Rhodes*.
Solicitors for the Respondent: Messrs. *Abrahams & Roffey*.

L. JJ.
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Nov. 11.

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Conflict of Laws—Lex Loci Contractus and Lex Fori—Contract made in Batavia—Bankruptcy in England—Registration.

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M. and his wife, who were married in *Batavia*, entered into a contract before the marriage, by which a sum of 75,000 guilders was settled on the wife for her separate use. By the law of *Batavia* no marriage contract excluding a community of goods has any effect as regards third parties until registered in the Courts of that country. The contract in question was never registered.

M. and his wife subsequently came to *England*, where *M.* became bankrupt, and his wife claimed to prove against his estate for the sum settled :—

Held, that the provision of the law of *Batavia* respecting registration did not affect the validity of the contract, but only the remedy of those claiming under it: that all questions of priority of creditors must be determined by the law of the country where the bankruptcy takes place; and therefore that *M.*'s wife was not precluded by the non-registration of the deed from proving for the sum settled *pari passu* with the other creditors.

THIS was an appeal from an order of the Registrar, Mr. *Spring Rice*, sitting as Chief Judge in the *London* Court of Bankruptcy, expunging and disallowing the proof of *Anna Eliza Melbourn*, the wife of the bankrupt, *George Melbourn*, for £6250.

The bankrupt was married to *Anna Tolson*, both being British subjects, on the 2nd of January, 1860, at *Batavia*, in the Dutch colony of *Java*, where they were then domiciled.

Previously to the marriage, on the 18th of December, 1859, they executed a marriage contract of that date, which was made according to the Dutch Indian law, and contained, among other things, the following stipulations :—

" Art. 1. Between the future consorts there shall not exist any communion of property or goods, nor of profit and loss, nor of benefits nor income.

" Art. 2. All and every the goods or moneys and effects which they respectively may have, either as their own free property or which they may have the usufruct of, or which they hold in trust at the time when the marriage is contracted, or which they may inherit, or which may be left them by legacy or otherwise, shall remain the separate property of each of the contracting parties

respectively, while, on the other hand, the person or property of the one shall not be liable or answerable for any debts or liabilities contracted or incurred by the other, either previous or subsequent to the marriage.

"Art. 3. The husband shall have the control and the management of all the property and effects of his wife.

"Art. 4. The goods of the female applicant consist of:—1st. Her clothes and appurtenances. 2nd. Her private jewels, trinkets, &c. 3rd. A sum of 75,000 guilders, which the husband gives to the wife for life, but of which the control remains with the husband, while the gift is made on condition that in case of the unhoped-for previous decease of the wife, the money given shall return to the possession of the husband."

This settlement was duly executed by the parties, and was attested by a notary; but was not registered, as required by the law of the Dutch East Indian colonies.

Mr. and Mrs. *Melbourn* subsequently returned to *England*, where they remained until the 24th of March, 1869, when Mr. *Melbourn* was adjudicated bankrupt.

Mrs. *Melbourn* claimed to prove against his estate for the sum of £6250, being the equivalent of 75,000 guilders, secured to her by the settlement. The Registrar disallowed the proof, and from this decision Mrs. *Melbourn* appealed.

After the notice of appeal had been given, Mr. *Melbourn*, the bankrupt, died.

The following opinion of M. *Auguste Philips*, an advocate in the Court of *Amsterdam*, with respect to the Batavian law applicable to the settlement, was given in evidence by the assignees:—

"The matrimonial law in Dutch *India*, with respect to property, is essentially as follows:—

"By marriage all the property belonging to the husband and to the wife is made common between them. All the goods of both parties are brought into community at marriage. This community includes all property real and personal, present and subsequently acquired, and is liable for the debts of both parties. By the sole operation of the law, marriage creates a *communio omnium bonorum.*

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"But the parties may, before their marriage, enter into nuptial contracts, which contracts must be made by notarial deeds, and cannot be altered after marriage. By such contracts the community of goods, which would otherwise take place, may be modified or even wholly excluded.

"It is, however, provided by Art. 152 of the Code of Dutch Indian Civil Law, in force since the 1st of March, 1848, that no stipulations in marriage contracts modifying or excluding the legal community of goods shall have any effect with regard to third parties but from the day on which such stipulations shall have been registered at the office of the Clerk of the Court of Justice under whose jurisdiction the marriage was contracted. The register, in which a copy of such stipulation is entered, is a special register open for inspection to the public.

"Marriage contracts made in foreign countries are, in the same way, subject to registration.

"If a merchant, who married at *Batavia* after the 1st of March, 1848, become a bankrupt, his wife cannot avail herself of any marriage contract nor claim any property as her separate property, and she cannot be admitted as a creditor unless the marriage contract, by virtue of which such claim might have been made, has been registered in the Court of Justice.

"I scarcely need to add that, if no registration of the marriage contract has been effected at the time of the marriage, a registration at a later period could only operate for the future, but would have no retroactive effect."

Mr. *Winslow*, and Mr. *Westlake*, for the Appellant:—

The Registrar rejected the proof on the ground that the settlement, not having been registered in the Court of *Batavia*, had no effect as against the creditors. But the non-registration does not affect the validity of the contract, but only the remedy of the persons claiming under it. The question whether the document constitutes a contract, and what the interpretation of that contract is, must be determined by the *lex loci contractus*, but all questions of remedy depend upon the *lex fori*: *De la Vega* v. *Vianna* (1).

In the present case there can be no doubt that there was a

(1) 1 B. & Ad. 284.

contract between the parties on which an obligation arose, although, as against third parties, the remedy was barred in the Dutch Courts. But that will not prevent one of the contracting parties pursuing her remedy in a Court which is not bound by the Dutch law, as in cases turning on the *Statute of Limitations*.

This is, in truth, simply a question of priority between the creditors of the bankrupt, and that question must be decided according to the law of the Court where the *concursus* of creditors takes place. This has been often decided in cases of administration, and the same rule will apply in the distribution of assets under a bankruptcy: *Preston* v. *Viscount Melville* (1); *Cook* v. *Gregson* (2); *Pardo* v. *Bingham* (3); *Story's* Conflict of Laws (4); *Savigny's* Conflict of Laws (5).

With respect to the amount of the proof, we contend that Mrs. *Melbourn* had not a life interest only, but that, on the death of her husband, the fund was given to her absolutely. She is, therefore, entitled to prove for the whole sum.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the assignee:—

We do not deny that, in the administration of assets in bankruptcy, the English law is to govern the priority of creditors. But that is subject to the rule that the creditors must shew that there is a debt existing according to the law of the country where the contract is stated to have been made. Here there was no contract. The contract was made contingent on the registration of the deed, and that has not been done. The formal requisites of a contract, according to the *lex loci contractus*, are necessary for its validity everywhere, as in the case of instruments void for want of a stamp: *Bristow* v. *Sequeville* (6); *Alves* v. *Hodgson* (7); *Westlake's* Private International Law (8).

We also contend that Mrs. *Melbourn's* interest was only for her life, and that it was not given to her for her separate use, but remained at her husband's disposal during their joint lives: *Spirett* v. *Willows* (9).

(1) 8 Cl. & F. 1.
(2) 2 Drew. 286.
(3) Law Rep. 6 Eq. 485.
(4) Sects. 323, 325 (f), 325 (i).
(5) Guthrie's Translation, p. 210.
(6) 5 Ex. 275.
(7) 7 T. R. 241.
(8) Sect. 173.
(9) 3 D. J. & S. 293.

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Mr. *Winslow* was heard in reply as to the extent of the interest taken by Mrs. *Melbourn.*

SIR W. M. JAMES, L.J., said that it would be more satisfactory if the opinion of a Dutch advocate were obtained on the construction of the document, namely, whether, assuming the document to be duly registered, and the husband to be dead, the wife is entitled under the contract, according to the Dutch Indian law, only to a user of the 75,000 guilders during her life, or to the absolute interest, or what other interest she has. The case might then be mentioned again to this Court.

The Court then gave judgment on the rest of the case.

SIR G. MELLISH, L.J.:—

This is an appeal asking that an order made by Mr. Registrar *Spring Rice,* expunging or disallowing the proof of *Anna Eliza Melbourn,* may be rescinded, and that the proof may be admitted for the full sum of £6250, or such lesser sum as this Court shall think fit to allow. Now, the question is, whether this lady is entitled to prove at all for this debt under these circumstances: She was married to the bankrupt in *Batavia,* and previously to her marriage there was a marriage contract, which is admitted to have been made before a notary, and to have been in itself, at any rate as between the parties, valid according to the law there. By that it was agreed that between the future consorts there should not exist "any communion of property or goods, nor of profit and loss, nor of benefits or income." Then by Article 4, on which this question turns, it was agreed that the goods of the wife should consist, among other things, of a sum of 75,000 guilders, "which the husband gives to the wife for life, but of which the control remains with the husband, while the gift is made on condition that in case of the unhoped-for previous decease of the wife, the money given shall return to the possession of the husband."

Now, the question is, whether the husband, having become bankrupt, the wife can prove for the amount to which she is entitled, be it the life interest or be it the entire interest in the sum. It has been contended that she cannot, because it is said that by the law of *Batavia* the marriage contract ought to have been regis-

tered, and that the fact of its not having been registered prevents her separate proof. We, of course, must take the law of *Batavia* from the only evidence which is before us—the opinion of the advocate who has been consulted, and who makes an affidavit as to what the law in *Batavia* is. [His Lordship read the opinion of M. *Auguste Philips*, and continued:—] It is clear from this statement of the Dutch law that the contract, having been made by a notarial deed, is in itself perfectly binding; and the next question, therefore, is, what is the effect of the 152nd article of the Dutch Indian Civil Code with respect to the registration of the deed? Now, I do not think there is any dispute as to the general principle of law which should govern this case. It is fairly laid down in the case of *De la Vega* v. *Vianna* (1). In the construction of a contract the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law here. The real question is, does this Article 152 prevent there being a contract at all, or modify the proper construction of the contract; or is it a mere provision with reference to the remedy on the contract? A great many other authorities and opinions of foreign jurists have been cited, but they are all really to the same effect.

Now, there seems no doubt at all that in the case of bankruptcy the question of priority of the different creditors *inter se* must be governed by the law of the country where the bankruptcy takes place, and where the assets of the debtor are being administered. The question then is, does this affect the contract itself? Mr. *De Gex* contends that the effect of it is this, that although there is a contract between the husband and wife, there is none as respects third parties. I have great difficulty in understanding that argument. It is admitted that, as between husband and wife, there is a debt and a binding contract. Then what is the meaning of saying it shall not be binding as between third parties, or it shall not affect third parties? Surely it only means that in an administration of the assets of the husband in bankruptcy this claim is to be postponed to the claim of all other parties.

No doubt, if a bankruptcy had taken place in *Batavia*, inasmuch as the law with respect to the registration of the deed had

(1) 1 B. & Ad. 284.

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not been complied with, any claims the wife might have against her husband would be postponed to the claims of all third parties; but there is no such law here. I am of opinion that it is simply a question of priority of creditors *inter se*, and does not prevent the wife from proving as a creditor of her husband in respect of this sum, which is in effect settled to her separate use; and that, as by the law of this country all creditors who have a right to prove are entitled to prove *pari passu* with the other creditors, she is in the same position, and is entitled to prove in the same manner.

SIR W. M. JAMES, L.J., concurred.

Solicitors for the Appellant: Messrs. *Sole, Turner, & Turner.*
Solicitors for the Respondent: Messrs. *Thomas & Hollams.*

L. JJ. 1870 *Nov.* 11, 12.

Ex parte TEMPEST.
In re CRAVEN AND MARSHALL.

Bankruptcy—Fraudulent Preference—Bankruptcy Act, 1869, *s.* 92.

In October, 1869, a creditor visited his debtor's place of business, and seeing that the business was misconducted asked him to pay off the money. The debtor proposed to give security on a certain property, but the property being insufficient it was arranged that the creditor should take it in satisfaction of part of his debt; and on the 6th of December the debtor and creditor went to a solicitor and instructed him to draw a conveyance accordingly. Owing to the illness of the solicitor the matter was delayed and the conveyance was not executed till the 3rd of February, 1870. On the 22nd of March the debtor filed a petition for liquidation:—

Held (affirming the decision of *Bacon*, C.J.), that as the conveyance was executed in pursuance of the verbal agreement made in December in consequence of the application of the creditor, it was not, according to the cases decided under the old law, a fraudulent preference; and that the *Bankruptcy Act*, 1869, s. 92, does not avoid as a fraudulent preference an act which was not such under the old law.

THIS was an appeal motion from an order of the Chief Judge in Bankruptcy, reversing a decision of the Judge of the County Court at *Huddersfield*, who had held a conveyance to be a fraudulent preference.

Abram Craven and *George Marshall* carried on business as spirit merchants in partnership at *Huddersfield*, *Marshall* being the managing partner.

The present proceedings were under a petition for liquidation filed by them on the 22nd of March, 1870. The circumstances relating to the conveyance which was impeached were as follows:—

In 1867 and 1868, *Phineas Craven* (who, though having the same surname, was not related to *Abram Craven*), lent to *Abram Craven* on his separate account sums amounting together to £450 on promissory notes, on which interest was paid up to January, 1869. Till October, 1869, he never pressed *A. Craven* for payment, nor had the loan been spoken of between them for some time. In October, 1869, *P. Craven*, as he deposed, had occasion to call at the place of business, and stayed there about an hour. He observed that *Marshall* and his wife seemed to be the worse for liquor, and that *Marshall* paid some accounts, which seemed to be his own private accounts, with money which he took from the till of the firm, and the deponent did not see him make any entry of the payment. He further deposed, that from his observations the business seemed to be conducted in an unsatisfactory way, and he made up his mind to mention the matter to *A. Craven* and insist upon payment. He saw *A. Craven* afterwards on that day, and asked him to come to his (*P. Craven's*) house at *Bradford* the next day, which he did, and dined with *P. Craven*, and as they were walking together to the railway station, *P. Craven*, who had not previously spoken to him about his affairs, told him what he had observed the day before, and that he should like the money to be repaid. *A. Craven* replied that he could not very well pay just then, but should have to try and get the money if *P. Craven* wanted it. *P. Craven* mentioned a property of *A. Craven's* in *Thornton Road*, and asked how it stood. *A. Craven* told him the amount due to a building society upon it. They discussed the value, and came to the conclusion that it would not pay both *P. Craven* and the building society. *A. Craven*, however, offered to give a security on it. *P. Craven* said he was "determined to have either the money or security," and it was at last arranged that *A. Craven* should give him a second mortgage on this property. After this, *P. Craven*, in consequence of the advice of his

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solicitor, proposed to buy the equity of redemption instead of taking a mortgage, and *A. Craven*, after some demur, agreed to this. On the 6th of December they both went to the solicitor's office, and gave him instructions to prepare a conveyance. Owing to the illness of the solicitor the matter was delayed, and the conveyance was not executed till the 3rd of February, 1870. The solicitor gave evidence to the same effect so far as related to those parts of the transaction in which he was concerned. The conveyance was a conveyance of the equity of redemption of the property for £400, which was set off against the debt, and upon completion the promissory notes were given up to *A. Craven*, who gave a fresh promissory note for the balance.

The trustee under the liquidation applied to set aside this deed as a fraudulent preference. The evidence clearly shewed that *A. Craven* and *Marshall* were hopelessly insolvent from the beginning of the transaction; but *P. Craven* denied knowledge of this. *A. Craven*, in his affidavit for the trustee, said: "On the 3rd of February last I conveyed this property to *P. Craven;* no money passed at the time, and I received no money then. I conveyed that property to Mr. *P. Craven* for the amount he was wanting; he was an intimate friend of mine, and we were brought up together. My motive in conveying the property to him was to make him secure and save him from a loss. He sent me no writ and no attorney's letter. Before I conveyed the property to him he had no security whatever except the promissory notes. At the time I conveyed the property to him I knew I was insolvent, and he had found it out too. The reason he found it out was, that he came over to *Huddersfield* last October, and he said things were not going on in the right way, and he must either have his money or security for it." On re-examination he said: "Mr. *Hargreaves* prepared the conveyance, and I did not pay him for it. Mr. *Craven* pressed me very heavy;" and in reply to a question from the Judge, he said: "I had no other motive in giving the deed but to make him secure. I might do it so that he may be better off than any of the other creditors."

The Judge of the County Court made an order for setting aside the deed. *P. Craven* appealed to the Chief Judge in Bankruptcy, who reversed the decision, holding that the deed was not a volun-

tary act, proceeding from the voluntary offer of the debtor, but was executed in consequence of the application of the creditor, and therefore, according to the authorities, was not a fraudulent preference. His Honour considered that the 92nd section of the Act of 1869 did not affect the case, and that the fraudulent preference which the statute intended to avoid was no other than the fraudulent preference which was held such before the statute. The case is reported: *Ex parte Craven* (1).

Mr. *Winslow*, and Mr. *Finlay Knight*, in support of the appeal:—

There are two points: was the deed fraudulent under the old law? and, if not, is it avoided by sect. 92 of the Act of 1869? *Abram Craven's* evidence shews that the deed was executed only from a wish to make *P. Craven* better off than the other creditors. It is, therefore, a fraudulent preference. *Cook* v. *Rogers* (2), *Cook* v. *Pritchard* (3), *Brown* v. *Kempton* (4), and *Kinnear* v. *Walmisley* (5), shew the principles applicable. The 92nd section was intended to do away with the difficulties arising from the decisions as to mixed motives, and to render it immaterial that the creditor applied for payment or security.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Respondent:—

This point is decided by *Brown* v. *Kempton*, which has been followed in *Edwards* v. *Glyn* (6), *Johnson* v. *Fesemeyer* (7), and other cases. Where there is a mixed motive there is no fraudulent preference. The Act does not alter the rule.

Mr. *Winslow*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge is perfectly right. He has proceeded as to the main question in dispute on the law as laid down in *Brown* v. *Kempton*, which has been

(1) Law Rep. 10 Eq. 648.
(2) 7 Bing. 438.
(3) 5 Man. & G. 329.
(4) 19 L. J. (C. P.) 169.
(5) 2 F. & F. 756.
(6) 2 E. & E. 29.
(7) 3 De G. & J. 13.

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recognised in several subsequent cases, and seems to establish a principle which can be applied without trying the question—upon which it is so difficult to arrive at any satisfactory conclusion—what was passing in the debtor's mind at the time of his making the conveyance or payment which is impeached as a fraudulent preference? The principle is, that in order to constitute a fraudulent preference the act must be the spontaneous act of the debtor, not *bonâ fide* originating in a demand or some other step of the creditor. A creditor would be subjected to great injustice if, after going to the debtor and demanding payment or security, and getting payment without any notice that he is getting an advantage over other creditors, he were to be deprived of what he thus honestly got because of something which was passing in the debtor's mind, of which he knew nothing. A creditor cannot be deprived of what he has got, if he got it by asking; if he got it by the purely voluntary act of the debtor, he must lose it. How does the matter stand here? The creditor saw great reason to be dissatisfied with the way in which the debtor's business was carried on: he went to the place of business and saw what was enough to alarm any one. The managing partner and his wife were both intoxicated, and he saw the managing partner paying his own debts out of the till, and making no entry of it. He asks the debtor to come and see him next day; the debtor comes and dines with him; they walk to the station together; the creditor tells the debtor that he is not satisfied, and must have either his money or security for it. They consider what security should be given. The creditor refers to some houses of the debtor which were subject to a mortgage, and asks how he stands as to them. It is agreed that the creditor shall have a security on them. Some further negotiation takes place, and the transaction assumes the form of an absolute purchase by the creditor of the equity of redemption in the houses for a part of the debt. The agreement was only verbal, there was no memorandum in writing to satisfy the *Statute of Frauds*, but they at once go to a solicitor and tell him to prepare a conveyance. Owing to circumstances personal to the solicitor the matter is delayed, and the conveyance is not executed till the 3rd of February, but it is executed in pursuance of an agreement come to on the 6th of December previous, and of instructions then given to the solicitor; it was

a completion of what had been done on that earlier day. Whatever were the circumstances of the debtor in February, it is impossible to hold that a conveyance then made in pursuance of an agreement entered into in December, in consequence of an application made by the creditor in December, is a purely voluntary act of the debtor so as to be a fraudulent preference. It is urged, however, that a different conclusion ought to be come to because of the answer of the debtor: "I had no other motive in giving the deed but to make him secure. I might do it that he may be better off than any of the other creditors." It was urged that here there was no mixed motive, that the debtor gave the deed for no other reason than that he wished to make his friend secure and better off than other creditors. An answer of this kind is not much to be relied on. The motive of giving a security always is to make the secured creditor safe and better off than other creditors. The question is, what is the motive of that motive? The case might have been different if he had been asked, "Would you have executed the deed if there had been no agreement in December?" and had replied, "That agreement made no difference; it had nothing to do with my executing the deed." He says himself, "Mr. *Craven* pressed me very heavy;" and that pressure would, on an ordinary mind, have a considerable effect, and quite bring the case up to *Brown* v. *Kempton* (1). The case of *Edwards* v. *Glyn* (2) is a strong case, and proceeds on the same principle; a principle to which it is most desirable to adhere, that the Court may not be embarrassed by having to inquire what was actually, as a matter of fact, passing in the debtor's mind in each case, instead of deciding upon facts which can be known with certainty.

It is said, however, that the *Bankruptcy Act*, 1869, s. 92, alters the law, and makes an application by the creditor immaterial. It appears to me that, to make that section apply, the transaction must be one which would have been an act of fraudulent preference under the old law; and even if it were not so, I think the creditor would be entitled to say in the present case that he is a purchaser *bonâ fide* and for valuable consideration, and is protected by the proviso at the end of the section.

(1) 19 L. J. (C. P.) 169. (2) 2 E. & E. 29.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. I think that the Chief Judge rightly applied the principle of *Brown* v. *Kempton* (1), as carried out in many subsequent cases. Had the question been one purely of fact, I should have given great weight to the decision of the County Court Judge who heard the principal witness examined before him, but we do not know the ground of his decision; and from the nature of the questions which, judging from the answers, he must have put to the witness, I infer that not having had the recent cases cited before him, he had not fully in his mind the rule which they establish as to fraudulent preference, that if there is a mixed motive, if the debtor is partly influenced by a demand of the creditor or by negotiations with him, the act is not a purely voluntary act, and is not a fraudulent preference, although the creditor may be a friend whom the debtor wishes to prefer. In the present case I think that there was a *bonâ fide* demand for security, and then a *bonâ fide* negotiation as to what the security should be; and though the debtor might know that he was hopelessly insolvent, he did not contemplate immediate bankruptcy, but was trying to stave it off. He then makes an arrangement with this particular creditor, which resulted in what appears to me to have been a *bonâ fide* sale.

As to the 92nd section, I agree with the view of the Chief Judge. I think that if the Legislature had intended to alter the law as to fraudulent preference to such an extent as to say that a payment made partly with the view of preferring a particular creditor, but partly in consequence of pressure, was a fraudulent preference, it would have said so more plainly. I think that the words are aimed at purely voluntary payments. And I also agree that, whether this be the case or not, the creditor is protected by the proviso as being a purchaser *bonâ fide* and for valuable consideration.

Solicitors: Messrs. *Learoyd & Learoyd;* Mr. *Flower.*

(1) 19 L. J. (C. P.) 169.

WOOD *v.* BOUCHER.

L. C.
1870
Dec. 16.

Practice—Petition—Costs of Respondent's appearing.

Where a Petitioner does not, on serving the Petition upon a Respondent who has no interest in the matter, tender him a sum sufficient to enable him to consult a solicit or as to the Petition, the Petitioner must pay the costs of the Respondent's appearing.

IN this case a Petition had been served on a Respondent whom it was necessary to serve, but who had no interest in the subject-matter of the Petition.

The Respondent appeared on the hearing, and the Master of the Rolls refused to allow him his costs of so appearing (1).

The matter was now brought before the Lord Chancellor.

Mr. *Brodrick*, for the Petitioner, said that under similar circumstances costs had been refused in *Templeman* v. *Warrington* (2); *Day* v. *Croft* (3); *Re Birch* (4); *Ex parte Churchill* (5). The Lord Justice *James*, when Vice-Chancellor, laid down a rule that if the Petitioner tendered 40*s.* costs the Respondent appeared at his peril: *In re Duggan's Trusts* (6).

Mr. *Bagshawe*, for the Respondent:—

Lord *Cottenham* always gave costs: *Crawshay* v. *Thornton* (7); and in *Tabuteau* v. *Warburton* (8), Lord *St. Leonards* gave the costs. The Vice-Chancellor *Kindersley* gave the costs in such

(1) 1870. Nov. 21. Lord Romilly, M.R., said that in the time of Lord *Cottenham* the practice was that every person served with a Petition was entitled to appear and have his costs, but that rule had been altered by Lord *St. Leonards* when Chancellor, after great consideration; and he now understood the rule to be that a party served was not entitled to his costs of appearance unless he had some special reason for appearing. Acting upon that rule he must disallow the costs of Mr. *Bagshawe's* client; but as it appeared that a different practice was adopted in other branches of the Court, he gave leave to bring the matter before the Lord Chancellor.

(2) 1 J. & W. 377, n.
(3) 19 Beav. 518.
(4) 2 K. & J. 369.
(5) 1 N. R. 140.
(6) Law Rep. 8 Eq. 697.
(7) 2 My. & Cr. 1, 24.
(8) 4 D. & War. 267.

L. C. 1870 ~~ WOOD v. BOTCHER.

cases: *In re Burnell's Estate* (1); and the Vice-Chancellor *Malins* gives the costs: *Clark* v. *Simpson* (2).

LORD HATHERLEY, L.C.:—

I confess that the rule laid down by Lord *Cottenham* seems, in many cases, to occasion costs unnecessarily; but when a Petitioner takes upon himself to serve a Petition upon a person, who may be wholly ignorant of the subject-matter of the Petition, and at the same time tells that person he need not appear, and that if he does he will not get his costs, then the person served is in fact required at his own peril to take the word of a Petitioner who, for his own purposes, is serving the Petition; and it always appeared to me very unreasonable that a person should be liable to pay the costs of his solicitor if he is prudent enough to consult one, instead of incurring risk by throwing the Petition aside.

A case which occurred in the House of Lords shews how dangerous it is to take no notice of a Petition. An order was made on an appeal which varied the decree to the prejudice of a co-Defendant, who had been served with the Petition of appeal and had not appeared, and the House of Lords held that, as he had been served with notice of the Petition of appeal, he ought to have appeared if he wished to protect himself.

The rule proposed by the Lord Justice *James*, when Vice-Chancellor, is in principle so very reasonable, that I should be inclined to follow it, though a rule cannot be considered to be settled until it is laid down by a General Order. It may be desirable to consult the other Judges as to laying down such a rule; but in this case no tender at all has been made, and Mr. *Bagshawe's* clients must have their costs. I should adopt the course, at all events, of holding that, where a sum had been tendered sufficient to enable the person served to consult a solicitor, then he would appear at his peril; but if no tender has been made, then the costs should be allowed. I do not see how the sum to be tendered can be fixed, as the Petition may be long or short, nor can I deal with the Taxing Master's duty, and say what sum ought to have been tendered.

Solicitors: Messrs. *Bell, Brodrick, & Gray*; Messrs. *Palmer, Eland, & Nettleship.*

(1) 10 Jur. (N.S.) 289. (2) Law Rep. 6 Eq. 336.

Ex parte ENGLISH JOINT STOCK BANK.
In re FINNEY.

L. JJ.
1870
Nov. 18.

Bankruptcy—Annulling Adjudication—Bankruptcy Act, 1869, s. 84—*Delegation of Powers of Chief Judge to Registrar.*

Where the creditors fail to appoint a trustee in a bankruptcy by reason of a quorum not being present, the Court ought not to annul the adjudication under the 84th section of the *Bankruptcy Act*, 1869, if one creditor wishes the bankruptcy to proceed, and his debt is so much greater than all the others that he is substantially the only creditor.

Therefore, in a case where the petitioning creditor's debt amounted to £3232, and there were only two other unsecured creditors, whose debts amounted to £67 and £42 respectively, and the petitioning creditor appeared but the two others did not, it was held that the bankruptcy ought to proceed under the Registrar as trustee.

The Registrar sitting as Chief Judge ought only to act in cases where he has the decisions of the Chief Judge or of the Court to guide him.

THIS was an appeal from an order of Mr. Registrar *Spring Rice* sitting as Chief Judge in the *London* Court of Bankruptcy.

On the 25th of May, 1870, the *English Joint Stock Bank, Limited*, filed a Petition in bankruptcy against Mr. *S. G. Finney*, founded on a debt due to them of £3232, and he was accordingly adjudicated bankrupt.

The bankrupt had three unsecured creditors; namely, the *English Joint Stock Bank*, for a debt of £3232; Mr. *Healey*, for £67; and Mr. *Irving*, for £42. He had also one creditor, whose debt was fully secured, and three whose debts were partially secured. The assets not included in the securities were of very trifling amount.

The first meeting of creditors was twice adjourned, but no creditor appeared except the *English Joint Stock Bank*, and there being no quorum of creditors no trustee was appointed. The Registrar accordingly reported the matter to the Chief Judge, and on the 3rd of August, 1870, Mr. Registrar *Spring Rice*, sitting for the Chief Judge, having heard counsel for the petitioning creditor and also for the bankrupt, annulled the adjudication under the

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84th section of the *Bankruptcy Act*, 1869 (1). From this order the petitioning creditors appealed.

The notice of appeal was served upon the Registrar and on the debtor.

Mr. Serjeant *Sargood*, and Mr. *Winslow*, for the Appellants:—

The bankruptcy ought not to be annulled in a case where there is a *bonâ fide* and substantial creditor who desires to proceed with it. The other creditors have debts of so small an amount that they did not think it worth while to attend; but that ought not to prejudice the petitioning creditor, who has a right to avail himself of the powers of bankruptcy to investigate the affairs of the bankrupt and realise the assets. The 17th section of the Act provides that until a trustee shall be appointed the Registrar shall act as trustee; there is, therefore, no difficulty in carrying on the bankruptcy.

[They also referred to sects. 16, 83, subs. 3, and sect. 84 of the *Bankruptcy Act*, 1869, and to the 93rd and 128th Rules of the Gen. Ord. of Jan. 1870.]

We object to counsel being heard for the debtor. On any question arising on the 84th section the bankrupt ought only to attend to be examined, not as a party concerned.

Mr. *Reed*, and Mr. *A. E. Miller*, for the debtor, submitted that whether or not the bankrupt was properly heard before the Registrar, he was now entitled to be heard, for he was no longer a bankrupt, and he had, moreover, been served with notice of the appeal.

The Lords Justices, without giving any opinion as to the right of the bankrupt to be heard before the Chief Judge, admitted his right to appear on the appeal.

(1) 32 & 33 Vict. c. 71, s. 84. The Registrar may adjourn the first meeting of creditors from time to time and from place to place, subject to the directions of the Court; but if at such first meeting of creditors, or at some adjournment thereof, no trustee is appointed by reason of the prescribed quorum not being present, or for any other reason whatever, the Court may annul the adjudication unless it deems it expedient to carry on the bankruptcy with the aid of the Registrar as trustee.

Mr. *Reed*, and Mr. *A. E. Miller*, were then heard for Mr. *Finney*:—

This is a matter for the discretion of the Chief Judge, which this Court will be reluctant to interfere with. The Registrar might reserve any doubtful case to be heard by the Chief Judge, or the Chief Judge might rehear it, although it had been heard by the Registrar: *Bankruptcy Act*, 1869, s. 71; Gen. Ord. of Jan. 1870, Rule 4. Bankruptcy is in the nature of an injunction to restrain one creditor from absorbing all the assets to the prejudice of the others, and to secure an equal distribution among the body of the creditors. It was not intended for the purpose of putting additional powers into the hands of a single creditor. He ought to have recourse to the ordinary tribunals: *In re Cowbridge Railway Company* (1); *Bankruptcy Act*, 1869, s. 13.

SIR W. M. JAMES, L.J.:—

I think it is very much to be regretted that this case was not heard in the first instance by the Chief Judge. The point which is raised is one of considerable importance, and it was not desirable that it should be disposed of for the first time by the Registrar. I think it must have been intended by the Legislature that when the Registrar acts as Chief Judge it should only be in cases where he has the decisions of the Chief Judge or of the Court to guide him. It is the more to be regretted in the present case, as it relates to the duties of the Registrars generally.

It is not, however, necessary that we should now lay down any general rule. It will be sufficient to state our views of this particular case, because it is pre-eminently one in which it appears to us expedient that the bankruptcy should continue. Here there was a petitioning creditor, and two other small unsecured creditors, the petitioning creditor's debt being of such overwhelming amount that he is entitled to be considered substantially the sole creditor who is putting the bankruptcy in force.

Now a sole creditor has a right to proceed against his debtor in bankruptcy, and he has a right to all the remedies provided by the bankruptcy law, which are very extensive. Why should he be

(1) Law Rep. 5 Eq. 413.

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deprived of that benefit unless for some good reason? The other creditors did not appear. If there had been numerous creditors and no assets it might have been considered a sham bankruptcy; it would have been right to annul it; but here we have a substantial creditor, who says, "I desire the bankruptcy to be carried on, even at my own expense, in order to get my debt out of the assets. I know that there are some assets, which are subject to certain charges. I wish to have those charges investigated and the assets realised." I think he has a right to hold fast the benefit of the remedies which the law has given, and that we ought not to deprive him of them by annulling the bankruptcy. The order must therefore be discharged.

Sir G. Mellish, L.J.:—

I am of the same opinion. The burden of proof is not on one side more than on the other; but the circumstances are such that they convince me that it is expedient to continue the bankruptcy with the Registrar as trustee. It has been argued that a bankruptcy is only for the purpose of preventing one creditor from gaining an advantage over the others. But there is another important object, namely, to enable the creditors to get paid out of the assets of the debtor. No doubt it is a principle of bankruptcy that the wishes of the majority of creditors should be carried out, and if it should appear in any case that the creditors not attending are as substantial as those who did attend there would be a ground for saying that the will of the majority had not been declared that the estate should be wound up in bankruptcy. But in this case the facts are that there is only one large creditor, and that all the assets are subject to charges, and may not be realised for some time. We may well, therefore, conclude that the smaller creditors would not think it worth while to have the bankrupt's affairs investigated, but the large creditor does think it worth while. The law gives greater facilities to do this in bankruptcy than in any other way. I am therefore of opinion that the bankruptcy ought to go on.

I agree with the Lord Justice that it is a pity that this case was not heard before the Chief Judge in the first instance. It is not

desirable that a general rule should be laid down without the matter going before the Chief Judge. The Appellant will have his costs out of the estate. The debtor will have no costs.

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Solicitors for the Appellant: Messrs. *Lawrance, Plews, & Co.*
Solicitors for the Debtor: Messrs. *Lowless, Nelson, & Jones.*

In re PATENT FILE COMPANY. *Ex parte* BIRMINGHAM BANKING COMPANY.

L. JJ. 1870 *Dec.* 13.

Company—Directors—Mortgage by Deposit—Mortgage to secure antecedent Debt.

The memorandum of association of a company, whose nominal capital was £100,000, stated its objects to be the manufacturing and selling of files and steel, and the doing all such other things (including the acquiring and "disposing of" lands and buildings) as were incidental or conducive to the attainment of those objects. The articles of association provided that the company might, with the sanction of an extraordinary general meeting, borrow on mortgage of its property any sums not exceeding one-half of its nominal capital, and provided that the directors might exercise all such powers of the company as were not, by the *Companies Act*, 1862, or by the articles, required to be exercised by the company in general meeting. The company passed a resolution authorizing a mortgage to the extent of one-third of the nominal capital. A few weeks after this the account of the company with their bankers being overdrawn to the extent of more than £23,000, and the bankers pressing for security, the directors deposited with them the title-deeds of the property on which the company carried on their business, and gave a memorandum of deposit under the seal of the company, making the deeds a security for the balance of account up to £25,000. Within six months after this a resolution was passed for winding-up:—

Held (affirming the decision of *Stuart*, V.C.), that this security was valid.

Semble, that, in the absence of any prohibition in the articles, a company may secure a past debt by deposit of title-deeds.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Stuart*, holding an equitable mortgage, by deposit, of the real estate of the *Patent File Company, Limited*, to be valid.

The *Patent File Company* was registered in 1863, with a nominal capital of £100,000. The memorandum of association stated the object of the company to be the purchasing letters-patent granted

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to *E. Bernot* for an invention of a new machine for cutting files, and of certain other letters-patent relating to files; the manufacturing, purchasing, or otherwise acquiring machines and apparatus applicable to the manufacture of files; the manufacturing, purchasing, or otherwise acquiring, and selling or disposing of files, blanks for files and steel, "and the doing of all such other things (including the purchasing, leasing, or otherwise acquiring, holding and disposing of lands and buildings) as are incidental or conducive to the attainment of the above objects or any of them."

The clauses of the articles of association referred to in the argument were the following:—

"41. The company may, with the sanction of an extraordinary general meeting, from time to time borrow and take up on mortgage of any of the property of the company, or on such other security as they may think fit, any sum or sums not exceeding in the whole one-half of the nominal capital of the company.

"42. Any mortgage bond or other security, bearing the common seal of the company and issued for valuable consideration, shall be binding on the company, notwithstanding any irregularity touching the authority of the directors to issue the same; and no person taking any such security shall be bound to ascertain that the amount then due by the company on mortgage or other security does not exceed one-half of the nominal capital of the company."

"75. The business of the company shall be managed by the directors, who may pay all expenses incurred in the formation and registration of the company, and may exercise all such powers of the company as are not by the *Companies Act*, 1862, or by these articles, required to be exercised by the company in general meeting, subject, nevertheless, to any regulations of these articles, to the provisions of the *Companies Act*, 1862, and to such regulations being not inconsistent with the said regulations and provisions as may be prescribed by the company in general meeting. But no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

"78. The directors are hereby empowered to do and execute all necessary acts, deeds, or assurances that may be necessary for the purchase or acquisition of the patent rights mentioned or

referred to in the memorandum of association, or for the purchase or taking on lease of lands or buildings, or the erection of buildings and machinery, or for the prosecution in any other manner of all or any of the objects of the company."

The *Patent File Company* had a banking account with the *Birmingham Banking Company*, which, in 1865, became heavily overdrawn. On the 9th of August, 1865, the balance being then above £11,000, the then manager of the bank wrote a letter requesting that it might be reduced.

On the 30th of August, 1865, an extraordinary general meeting was held and the following resolution passed: "That the directors be and are hereby authorized to borrow and take up from time to time on mortgage of the lands, buildings, and fixed machinery of the company, or on such part thereof as they deem fit, or upon debentures under the seal of the company, such sum or sums of money not exceeding in the whole one-third of the nominal capital of the company, and that the directors are hereby authorized to affix the seal of the company to all instruments which they deem requisite for giving full effect to this resolution."

No loan could be obtained, and in April, 1866, the overdrawing having been increased, Mr. *Shaw*, the new manager of the bank, applied to the *Patent File Company* to reduce the balance, and on the 1st of May wrote to the company that the balance must not be increased before the special board meeting, which was to be held on the 10th of May. Soon after this the managers had an interview, and Mr. *Shaw* said that security would be required. On the 10th the directors resolved that their solicitors should be authorized to give a mortgage, by deposit of the title-deeds of the property on which the business of the *Patent File Company* was carried on. This was completed on the 30th of May, and the deeds were deposited, with a memorandum of deposit, under the seal of the company, making them a security for what should be due to the bank to the extent not exceeding £25,000. At this time more than £23,000 was due, and the property in the security was estimated as worth about £35,000.

In October, 1866, a Petition for winding up the *Patent File Company* was presented by a creditor, but stood over; and on the 13th of December, 1866, a resolution was passed for the voluntary

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winding up of the company. The Petition afterwards came on for hearing, and on the 12th of January, 1867, an order was made for continuing the voluntary winding-up under supervision.

The property, the title-deeds of which had been deposited, having been sold under the direction of the Court, without prejudice to the rights of the parties, the *Birmingham Banking Company* applied to have the proceeds paid to them, and the liquidator took out a cross summons to have the equitable mortgage declared void. Vice-Chancellor *Stuart* held that the security was valid.

From this decision the liquidator appealed.

Mr. *Hardy*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

This was a fraudulent preference, and therefore void under the *Companies Act*, sect. 164. It was also bad, as a conveyance in fraud of creditors: *Woodhouse* v. *Murray* (1); *Ex parte Foxley* (2); *Goodricke* v. *Taylor* (3). Apart from these grounds the mortgage is bad, as being *ultrà vires*: *Scott* v. *Colburn* (4); *Australian Auxiliary Steam Clipper Company* v. *Mounsey* (5); *In re Inns of Court Hotel Company* (6); *Bateman* v. *Mid-Wales Railway Company* (7); *In re Peruvian Railways Company* (8). The case of *Athenæum Life Assurance Society* v. *Pooley* (9) is strongly in our favour. The express powers of mortgaging given by the articles and the resolution negative by implication any other power of mortgaging, even if the directors would otherwise have had it, which we contend they would not, mortgaging property being no ordinary incident to the carrying on business of this nature. Now the express power extends only to a mortgage to obtain money, not to a mortgage for a pre-existing debt.

Mr. *Dickinson*, Q.C., and Mr. *Chitty*, *contrà*, were not called upon.

SIR W. M. JAMES, L.J.:—

This case appears to me one of the simplest description. The company is a body corporate, and by the law of *England* a body

(1) Law Rep. 2 Q. B. 634.
(2) Ibid. 3 Ch. 515.
(3) 2 H. & M. 380; 2 D. J. & S. 135.
(4) 26 Beav. 276.
(5) 4 K. & J. 733.
(6) Law Rep. 6 Eq. 82.
(7) Ibid. 1 C. P. 499.
(8) Ibid. 2 Ch. 617.
(9) 1 Giff. 102, 114; 3 De G. & J.

corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing. In the memorandum and articles of this company I can find nothing to prevent the company *quâ* company from pledging part of its property for payment of a debt incurred in the course of its business. It is equally plain that, under these articles, the directors can do anything which the company could do, unless it is an act which they are specially prohibited from doing. I can find nothing in the memorandum or articles to prevent the directors from making the best terms they can with a creditor of the company by selling or pledging part of the property of the company. No doubt, a disposition of the property by the directors might be void in equity if it were contrary to the objects of the company; the directors would then be restrained from doing the act, as being an abuse of their fiduciary position. But in the present case there is nothing to prevent the company from making such an arrangement as this with a creditor, nor is there anything to prevent the directors from doing so.

There is no pretence for saying that this is a case of fraudulent preference. The bank required security. The directors cannot be supposed to have had any particular affection for the bank, but they wanted accommodation from the bank, and so they gave the security required. They mortgaged property worth £35,000 for £25,000, so it was not a security exhausting the property, and it was not tendered by the debtor, but asked for by the creditor.

SIR G. MELLISH, L.J.:—

I am of the same opinion. As to the question of fraudulent preference, the case is perfectly clear. The security was given in consequence of a demand by the creditor, and not only so, but there is nothing to shew that a winding-up of the company was then contemplated. On the contrary, the directors intended to go on, and thought that by raising money they could retrieve the affairs of the company. It was next urged that this security was void, because it was a pledging the entire property of the company in such a way that, if done by an individual, it would have been an act of bankruptcy. The answer to this is twofold. First, that there is no provision in the *Companies Act* that every transaction

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which in the case of an individual would be an act of bankruptcy shall be void as against creditors; and the Legislature appears designedly to have omitted any enactment of that kind. Secondly, this is not a mortgage of the whole property of the company, for the shares were not fully paid up.

The third objection is the only one that could raise any serious doubt, namely, whether a joint stock company of this kind can raise money or give security for a past debt by deposit of title-deeds. It was urged that no company can mortgage unless expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so. The 43rd section of the Act appears to recognise the creation of mortgages as an ordinary incident to a company. The memorandum in the present case mentions as a purpose of the company the "disposing of" its landed property. The articles give to the directors the whole powers of the company, subject to the provisions of the articles and of the *Companies Act*, 1862, and I cannot find anything either in the Act or the articles to prohibit their making a mortgage by deposit. It would, in my opinion, be most undesirable to lay down a rule that no joint stock company can raise money in this way. A mortgage by deposit is the kind of security most usually given by mercantile men to bankers, and such a rule would seriously cripple joint stock companies in their business transactions. There being nothing in the articles to prohibit the giving such a security, I am of opinion that the company can give it as well for a past debt as for a future one. In fact, the case is stronger in favour of a security for a past debt, as it would be absurd to say that a company has not power to pay past debts; and if so, why should it be debarred from giving security, which is one way of applying its property in payment of its debts?

Solicitors: Messrs. *Newman, Dale, & Stretton;* Mr. *James Crowdy.*

LAZENBY *v.* WHITE.

L. J. J.
1870
Dec. 22.

Practice—Advancing Appeal.

An appeal from a decree granting an injunction to restrain the use of a trade-mark ordered to be advanced, on the ground that the injury done to the Defendant by the continuance of the injunction, if wrongly granted, would be irreparable.

THIS was an application by the Defendant to advance the hearing of an appeal.

The bill was filed by the Plaintiff, as proprietor of the original *Harvey's* sauce, to restrain an invasion of his rights by the Defendant. No interlocutory injunction was applied for, but on the 18th of November, 1870, the Master of the Rolls made a decree granting a perpetual injunction to restrain the Defendant from selling any *Harvey's* sauce not prepared by the Plaintiff, and purporting to be the original *Lazenby's Harvey's* sauce, and from selling any sauce described as or purporting to be *Harvey's* sauce, made by *E. Lazenby*, or *E. Lazenby & Son*, or by any successor to *E. Lazenby & Son*, and from using any labels representing by colourable imitation or otherwise that the sauce sold by the Defendant was the same as that made and sold by the Plaintiff. The Defendant was ordered to pay the costs of the suit.

The Defendant, on the 3rd of December, presented his petition of appeal, and now made this application to have it advanced; in support of which he deposed that, if the hearing of the appeal should be delayed, his business would be ruined.

Sir *R. Baggallay*, Q.C., and Mr. *Homersham Cox*, for the motion:—

The case is within the principle of *London, Chatham, & Dover Railway Company* v. *Imperial Mercantile Credit Association* (1). The injunction having been granted at the hearing, the Plaintiff is under no undertaking as to damages; and the Defendant, if ultimately successful, will get no compensation for the ruin of his business, which will take place if the hearing is delayed.

(1) Law Rep. 3 Ch. 231.

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No Counsel appeared for the Plaintiff.

SIR W. M. JAMES, L.J.:—

I think that I may venture to act for my learned brother as well as myself in ordering this appeal to be advanced, on the ground that the case is one of irreparable damage. If a bill to restrain the cutting ornamental timber were dismissed, I should think that an appeal from the dismissal ought to be advanced, as otherwise the timber might all be cut down before the hearing; and the present case stands on a similar footing.

Solicitors: Mr. *G. F. Smith*; Messrs. *Bailey, Shaw, Smith, & Bailey.*

MAWSON *v.* FLETCHER.

L. JJ.
1870
Nov. 23.

Vendor and Purchaser—Conditions of Sale—Title—Compensation—Right to rescind.

Upon a sale of land, one of the conditions provided that if any objection was persisted in, the vendors might rescind the contract; and another condition provided that if any mistake should appear to have been made in the description of the property, or of the vendors' interest therein, such mistake should not vitiate the sale, but compensation should be given.

The purchaser objected that certain minerals under the land appeared to belong to the lord of the manor; the vendors answered that this would not be compensated for, being the result of an enfranchisement as to which there was a condition. The purchaser persisted in the objection, and the vendors gave notice that they should rescind the contract. The purchaser then filed his bill for specific performance with compensation, and the vendors by their answer alleged that they had in fact a title to these minerals, but had rescinded under the conditions:—

Held, that the objection taken by the purchaser was an objection to title to part of the property sold, the removal of which might involve a long and expensive inquiry; that the vendors had a right to rescind, and that performance with compensation would not be compelled.

Decree of the Master of the Rolls affirmed.

THIS was a suit by a purchaser of land for specific performance of the contract, with a deduction from the purchase-money.

The land was bought at a sale by auction. It was stated in the particulars to contain freestone and limestone. The 5th condition of sale provided that any part of the property which had been enfranchised would be sold subject to reservations contained in the deed of enfranchisement; the 6th condition enabled the vendors to rescind, if any objection or requisition was persisted in; and the 14th condition provided for compensation in case of any error or mistake in the description of the property, or of the vendors' interest therein.

The purchaser investigated the title, and delivered requisitions thereon, by one of which he claimed compensation for the mines and minerals under the land, as being, by one of the title-deeds, reserved to the lord of the manor. The vendors answered, that the reservation contained in the deed was the result of an enfranchisement, and would not be compensated for. The purchaser still

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claimed compensation, which the vendors refused, offering to rescind if the purchaser considered that he had been misled. Ultimately, the solicitors for the vendors, on the 1st of March, 1869, wrote to the solicitors for the purchaser, stating that unless the title was accepted unconditionally before the end of that week the contract would be rescinded, pursuant to the conditions of sale. No answer was sent; and the solicitors for the vendors wrote again on the 8th of March, inclosing a cheque for £246 for the deposit, and stating that from that date the contract for sale would be considered as rescinded. The solicitors for the purchaser returned the cheque, insisting upon performance with compensation: and the purchaser then filed the bill in this suit for specific performance with compensation. The vendors by their answer alleged that they had a good title to the minerals, but had rescinded the contract. The Master of the Rolls dismissed the bill with costs, as reported (1), where the facts are fully stated.

The Plaintiff appealed.

Mr. *Southgate*, Q.C., and Mr. *Dryden*, for the Appellant:—

We say that this case comes clearly under the condition as to misdescription, which is not overridden by the condition for rescinding: *Newby* v. *Painter* (2). If this course can be adopted, the condition as to misdescription is rendered nugatory, for every case involving compensation must arise from a defect of title to part. The condition expressly refers to the "vendors' interest," which shews that it was not to be confined to a misdescription in the quantities of land sold. This is a clear case of misdescription: *Nelthorpe* v. *Holgate* (3); *Hoy* v. *Smythies* (4). We say that freestone and limestone are minerals, and are reserved to the lord. The vendors did not at first deny this, and only said, in fact, that we were bound by the 5th condition, as to enfranchisement; but that certainly did not apply, and it was not till the vendors put in their answer that they claimed to have a good title to the limestone and freestone.

[The LORD JUSTICE MELLISH:—The vendors, in fact, say that

(1) Law Rep. 10 Eq. 212.
(2) 11 Hare, 26.
(3) 1 Coll. 203.
(4) 22 Beav. 510.

they have a good title. You may not be satisfied with it, and insist on a long and expensive inquiry; but they may find another purchaser who will be satisfied, and therefore they rescind the contract. It may be conceded to you that, if there was a clear case of defect of title to part, you would be entitled to specific performance with compensation; but it is not so, and we cannot now make a decree for specific performance with compensation, inasmuch as there must first be an inquiry whether the vendors have a title; that inquiry will probably be long and expensive, and be the very thing which the vendors wish to avoid.]

We should have to pay the expense of that inquiry if the vendors turned out to have a good title. As the vendors have misled us, the *onus* is on them to shew that they have a title, and they are not justified in arbitrarily rescinding: *Turpin* v. *Chambers* (1); *Duddell* v. *Simpson* (2). They never said that they claimed these minerals, and if they had admitted that they had no title to them, we must have had a decree for specific performance with compensation.

Mr. *Jessel*, Q.C., and Mr. *Jackson*, for the Defendants, were not called upon.

SIR W. M. JAMES, L.J.:—

It appears to me that the decision of the Master of the Rolls ought to be affirmed. This was a sale by auction upon certain conditions, one being that "if any objection or requisition be delivered and persisted in, the vendors shall be at liberty to rescind the contract on returning to the purchaser his deposit, without interest or expenses." The property was about forty acres, and was said to contain limestone and freestone, and there was also a condition as to the enfranchisement. Now, upon investigation of the title, it appeared that upon one of the deeds there was a notice of the rights of the lord of the manor to minerals; and on further investigation an old deed was produced, which contained words purporting to reserve to the lord of the manor all mines and minerals whatsoever, raising, therefore, a presumption that the

(1) 29 Beav. 104. (2) Law Rep. 2 Ch. 102.

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reservation of the rights was of the same rights as those on the customary lands, which, it was said, included freestone and limestone. This was a very serious objection to the title. The land is described as containing very valuable limestone and freestone, and, no doubt, they would be valuable to a purchaser. Then there was the question, whether the vendors could or could not by adverse possession, or otherwise, make out a title to the freestone and limestone. That is as much a question of title as if it related to any portion of the surface, and is a question of title to a particularly valuable part of the property.

The first answer was, that the question was covered by the 5th condition, but that would not be enough in this Court to enable the vendors to force such a title upon an unwilling purchaser; and therefore the vendors virtually say that in their opinion it is covered by the 5th condition, but if the purchaser considers that he has been misled, then the vendors will rescind the whole contract.

That appears fair and proper, but giving that answer did not make it the less an objection for want of title. The objection was persisted in, and the vendors give a week's notice of their intention to rescind; the vendors write again, and receive no answer, except that the purchaser persists in the objection.

He now claims compensation, and yet says it is not a question of title, though he claims because there is a defect of title to part of the thing agreed to be sold. The vendors, on the other hand, may say that the very reason why they put in that condition was to avoid going into a long and expensive inquiry. The thing to be ascertained would be the extent of defect in title. Suppose it turned out that the freestone and limestone did not belong to the lord of the manor, but that the coal did, then the compensation would be different, and the vendors wished to be protected from all these difficulties.

It is true that the vendors could not make such a contract, and avail themselves arbitrarily of this condition to put an end to it; but in this case it is impossible not to see that they would be involved in very considerable trouble and expense by such an inquiry as would be necessary.

I cannot say that they were not entitled to give this notice to

rescind; they seem to have given it *bonâ fide*, and the Plaintiff brought it upon himself. He filed his bill as entitled to compensation. The Master of the Rolls held him not entitled, and we are of the same opinion. The bill ought to be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The objection raised by the Plaintiff is, that the title to the freestone and limestone under part of the property sold cannot be made out, because it appears on one of the deeds that these minerals had been reserved to the lord of the manor; and it is not the less an objection to title because, instead of stating it as such, the purchaser claims compensation. The real question is, whether the objection is an objection to title or merely as to a misdescription, because it does not extend to the whole property:—[His Lordship then read the 6th condition, and observed that it was in the most general terms. He then read the 14th condition.] Now, is there any error or mistake in the description? There is a general description, and also a description of this particular lot, but as to a material and essential portion it appears that the vendors have not a title; at least, the objection is made that they have not the title, which is said to be in the lord of the manor. Now, that is an objection to title; the description is accurate, but the vendors cannot make out a title.

An answer was made which referred to the 5th condition. That was not a sufficient answer. The purchaser still insisted on the objection, and claimed compensation; and the vendors, by their letter of the 1st of March, gave the purchaser the opportunity of saying that he would take without compensation, which Lord *Cairns*, in *Duddell* v. *Simpson* (1), says ought to be given.

The purchaser never answered that letter, thereby admitting that he was not disposed to waive the objection. He allowed the time to go on, and then the vendors' solicitors wrote another letter stating that the contract was rescinded. That I take to be rescinding the contract under the conditions; and, in my opinion, the

(1) Law Rep. 2 Ch. 102.

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Plaintiff had no right to file this bill, which was very properly dismissed by the Master of the Rolls.

Solicitors for the Plaintiff: Messrs. *Gray, Johnston, & Mounsey*, agents for Messrs. *Benson & Moordaff, Cockermouth.*

Solicitors for the Defendants: Messrs. *Bischoff, Bompas, & Bischoff*, agents for Mr. *Waugh, Cockermouth.*

L. JJ. 1870 *Dec.* 12.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

VINING'S CASE.

Company—Contributory—Winding-up—Reconstruction of Company—Dissentient Shareholder—Purchase of his Interest by Liquidator—Companies Act, 1862, *s.* 161.

A company having resolved on a voluntary winding-up, and the reconstruction of the company, with a new capital, new articles, and a new name, a dissentient shareholder gave notice to the liquidators, under the 161st section of the *Companies Act*, 1862, requiring them to purchase his interest in the company. The liquidators accordingly took a transfer of his shares:—

Held (reversing the decision of *Malins*, V.C.), that the liquidators had no power, under the 161st section, to release the dissentient shareholder from his liability to the creditors, but only to purchase such interest as he had in the assets of the company; and, consequently, that the shareholder's name must be put on the list of contributories.

THIS was an appeal from an order of Vice-Chancellor *Malins*, made in the winding up of the *Imperial Land Company of Marseilles, Limited.*

Mr. *James Tally Vining* was an original allottee of 200 shares in the company, and had paid in respect thereof calls and other payments to the extent of £7 10*s.* per share. In the month of February, 1867, he contracted, through Mr. *H. Vallance*, to sell these shares to the Vicomte *de Caze* for the full sum which he had paid for them, with interest thereon, but the contract was not completed till the month of December, 1867.

On the 22nd of August, 1867, a meeting of the shareholders of the company was held, at which it was resolved that a plan suggested by the directors, and which had been previously notified

to the shareholders, should be carried out for the reconstruction of the company, by the formation of a new company, with a new capital, and new articles, to be called the *Consolidated Land Company of France, Limited*, and that for this purpose the *Imperial Land Company* should be wound up voluntarily. It was also resolved, that in case any member of the old company should become entitled to have his interest therein purchased by the liquidators, the moneys required to be paid for purchasing such interest should be raised by a sale to be made by the liquidators of the shares and debentures of the new company which might have been taken or received by such member; and if the moneys produced by such sale should be less than such purchase-money, then the deficiency was to be raised by the liquidators, by their selling or converting into money all or any part of the assets of the old company which should not be required for discharging its liabilities other than those in respect of such purchase-money, and if more than such purchase-money, then the surplus should be dealt with as assets of the company.

This resolution was confirmed at another meeting of the company, held on the 5th of September, 1867.

Mr. *Vining* dissented from the resolution as to the reconstruction of the company with the consent of the Vicomte *de Caze*, and served a notice upon the company to that effect; and he required the directors either to abstain from carrying such resolution into effect, or to purchase the interest held by him in the company at a price to be determined according to the provisions of the 162nd section of the *Companies Act*, 1862.

An arrangement was ultimately made between the Vicomte *de Caze* and the liquidators, with Mr. *Vining's* assent, for the purchase by the liquidators of the 200 shares, for the following price, that is to say, the abandonment of the calls then due on the shares, and the delivery of bonds of the *Consolidated Land Company of France*, of the value of £2100; and such shares were accordingly transferred on the 31st of December, 1867, by Mr. *Vining*, with the assent of the Vicomte *de Caze*, to the liquidators of the company, and the transfer was registered in the books of the company.

Mr. *Vining's* name, however, was never actually removed from the list of shareholders.

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On the 7th of December, 1868, a Petition was presented for continuing the voluntary winding-up of the company under the supervision of the Court, and the order was made on the 22nd of the same month.

Mr. *Vining's* name had been placed upon the list of contributories, on the ground that he was still liable to any future calls for payment of the liabilities of the company. He accordingly moved, before the Vice-Chancellor, to have his name removed from the list.

The Vice-Chancellor was of opinion that the reconstruction of the company was the formation of a new company within the 161st section of the *Companies Act*, 1862, and that the effect of the transfer of the shares to the official liquidators was that Mr. *Vining* ceased to be a member of the company, and therefore ordered his name to be struck off the list of contributories (1). From this decision the liquidators appealed.

At the date of the hearing before the Vice-Chancellor no debts had been proved against the *Imperial Land Company*, but since that time several holders of debenture bonds issued by the company had been admitted to prove: *Ex parte Colborne & Strawbridge*, before Vice-Chancellor *Malins*, on the 21st of November, 1870.

(1) 1870. July 21.

SIR R. MALINS, V.C.:—

The question is, whether this case falls within the 161st section of the Act. The effect of the resolution passed by the shareholders was to reconstruct the company with a new capital, new articles of association, and a new name. This, in my opinion, is the formation of another company within the meaning of the 161st section of the Act of 1862, and, consequently, Mr. *Vining* was at liberty to avail himself of the privileges given to dissenting members under that section.

At the date of the reconstruction of this company there had been a binding contract entered into by Mr. *Vining* for the sale of his shares, but this did not preclude him from making an agreement, under the 161st section, with the company for the sale of his shares, with the consent of the person to whom they were contracted to be sold, nor would it have prevented the person so contracting from selling the shares with the consent of Mr. *Vining*. These shares were actually sold by him to the liquidators on the 30th of December, 1867, with the assent of the Vicomte *de Caze*, and the transfer was immediately registered in the books of the company. After that transfer Mr. *Vining* ceased to be a member of the company, and his name must therefore be taken off the list of contributories.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the Appellants :—

The Vice-Chancellor proceeded on the supposition that this was only a question between the dissentient shareholder and the rest of the shareholders, but since the order was made it has been proved that there are creditors to a large amount, and their interests cannot be affected by the bargain between the liquidators and Mr. *Vining*. He was a shareholder at the time of the commencement of the winding-up, which was the passing of the confirmatory resolution: *Weston's Case* (1)—and nothing in the Act or in the transaction has discharged him. He relies upon the 161st section of the *Companies Act*, 1862. But, in the first place, that section has no application, because in this case there was no transfer of the assets of the old company to a new one, but simply an arrangement whereby the old company was reconstructed. In the second place, the purchase by the liquidators contemplated by that section is a purchase of the interest of the dissentient shareholder in the assets, not a transfer of his shares. The Act gives no power to release him from his liability as a contributory, which still remains as regards the creditors, although he may be entitled to an indemnity from the other shareholders.

Mr. *Jackson*, for the creditors' representative, took no part in the argument.

Mr. *Cotton*, Q.C., and Mr. *Graham Hastings*, for Mr. *Vining* :—

We do not claim an entire freedom from liability as against creditors, but we say that Mr. *Vining* ceased to be a shareholder on the 31st of December, 1867, which was before the supervision order, and that he ought only to be on the list of past members. *Weston's Case* did not decide that the confirmatory resolution is the commencement of a voluntary winding-up for all purposes, but only that where a supervision order is made on a Petition for a compulsory winding-up, presented before the resolutions for voluntary winding-up, the date of the voluntary winding-up under supervision is not to be carried back to the presentation of the Petition. The effect of the order to "continue the winding-up under supervision" by its very form confirms what has been done

(1) Law Rep. 4 Ch. 20.

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previously to the order: it cannot destroy the validity of acts which were valid before. In the present case the liquidators had, before the supervision order, power under the 161st section not only to purchase the interest of the dissentient shareholder, but to take a transfer of his shares. The 131st section expressly recognises the validity of transfers "made to or with the sanction of the liquidators," and such transfers could not be made without affecting the liability of shareholders to creditors.

There is no pretence for saying that the *Consolidated Land Company* was not a new company within the 161st section. There were new articles, new capital, and new shareholders.

SIR W. M. JAMES, L.J.:—

In this case we do not agree with the Vice-Chancellor in the conclusion at which he has arrived; but the Vice-Chancellor had not before him the very material fact which we have, namely, that the question is now between the creditors and the shareholders, and not between the retiring shareholders and the other shareholders who are desirous of continuing. The real question is, as it seems to me, in substance this: Under the 161st section, does a shareholder, by giving notice that he is a dissentient shareholder, and that he insists either upon their paying him off or discontinuing the arrangement, cease to be a shareholder, so as not to be a member of the company at the time of the winding-up? I find nothing in the Act of Parliament which says that a person being a shareholder ceases, by virtue of that arrangement, to be a shareholder; there is nothing in that section that appears to me to qualify the plain words of the previous section, which says that every person who shall be a shareholder at the commencement of the winding-up shall be liable to contribute to the debts.

It is said that the mode in which this was done, namely, by a transfer of shares, made a difference. But the 161st section merely contemplates a sale of the interest of that dissentient shareholder to the company, whatever it may be, or whatever the consequences of it may be. It was not intended that the shares should be kept alive because the company has been wound up. The company may make the best bargain it can with the dissen-

tient shareholder, and the dissentient shareholder may make the best bargain he can with the company. But it was never intended to affect the status of the shareholder as between him and the outside world, or to affect the rights of any creditor whatever. The Act of Parliament does not make him cease to be a shareholder, and he was therefore a shareholder at the time of the winding-up.

It was conceded, in the course of the argument, that if the transaction had assumed a different form—if there had been no transfer in this case—Mr. *Vining* would still have been a shareholder. If, for instance, he had made a bargain with the company to sell the shares for £1000, to be paid six months afterwards, the shares would still have remained in his name, and he would have been still a shareholder. In other words, the 161st section does not of itself, by the mere fact of the shareholder declining to assent to the new arrangement, relieve him from his liability as a shareholder. But then, it is said here that the liquidators have power under the 131st section to take a transfer to themselves, and that they having taken a transfer to themselves as part of the arrangement, Mr. *Vining* is released from the responsibility, and that the liquidators ought to be put in his place.

When, however, we look into the circumstances, it is clear that this transfer was only made with a view to carry into effect the arrangement for a sale to the company: it was never intended to be a transfer to the liquidators in their own right. It appears to me that the liquidators had no right, under the resolution of the company, to make the arrangement which they entered into. They had a right to make a bargain with this gentleman, to purchase his shares at a certain price, to be realised out of the new shares that would have been allotted to him if he had been an assenting shareholder, and if that should be insufficient, by a sale or realisation of some other assets of the company. That was the only authority they had under the resolution of the company. They proceeded to do something else, that is to say, to take a transfer of his shares on behalf of the company, and to release him from calls that were then due, and to provide some other consideration. All that was *ultrà vires*. It was never intended to be a transaction of sale and transfer as between Mr. *Vining* and the liquidators

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personally, and therefore it comes back to the simple case of a shareholder who, being minded not to go on with the new company, has called upon the company to buy his interest. It might have been bought in the proper manner, but not so as to prevent his being still a shareholder in respect of those shares. The 161st section, as it seems to me, does not contemplate any alteration of liability as between the dissentient shareholder and the creditors, whose debts are to be contributed to by all the shareholders.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Mr. *Vining* having been a shareholder at the time the resolution to wind up was passed, is clearly *primâ facie* liable to be a contributory; and the question is, whether he is discharged from that liability by having made a transfer according to the true meaning of the 161st section. Now it is to be observed that the 161st section only applies when a company is to be wound up. Then, if it is to be wound up, of course its assets and the calls upon its shareholders are to be applied towards payment of its debts; and *primâ facie* all its shareholders are liable to contribute to these debts according to their shares.

Now what is there to discharge that liability? The section says that a dissentient shareholder may give notice to the company "either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned." What is the meaning of the words "purchasing the interest held by such dissentient member?" Does it mean purchasing his shares, and having them transferred? Surely it would have been easy for the Legislature to have said, "and to purchase the shares of the dissentient member," if that is what they meant. But what they say is, "to purchase the interest held by such dissentient member;" that is to say, to purchase the interest which a shareholder of the company has in the assets of the company, that company being in the course of being wound up. The shareholder has still an interest in the assets of the company. He is entitled to a share in whatever surplus there may be. Instead of receiving what the proposed new company was to pay to each member who assented,

he is entitled to say, "I will have the valuation of my interest in the old company, as a company to be wound up, made, and receive that before the company is dissolved." I am of opinion, therefore, that this section does not contemplate any transfer of the shares. That being so, the mere fact of his having, without authority, made an actual transfer cannot possibly affect the liability of this gentleman. No doubt the 131st section does seem to contemplate that, in some cases of voluntary winding-up, there may be a transfer of shares. It is not at all easy to say what cases those are; they may be cases where the articles of association enable the directors to take the shares, or where a compromise has been made. But there is nothing in the language of the 131st section to lead me to believe that it refers to the case of the 161st section. I am of opinion that, by the 161st section, all that is contemplated is, that the interest of the shareholders in the company that is being wound up should be sold, and the purchase-money of it paid, but that it is not contemplated that the shares themselves should be transferred. Mr. *Vining's* name must therefore be settled on the list of contributories.

Solicitors for Mr. *Vining*: Messrs. *Vining & Son.*
Solicitors for the Liquidators: Messrs. *G. S. & H. Brandon.*

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Dec. 13, 14, 15.

In re COUNTY MARINE INSURANCE COMPANY.

RANCE'S CASE.

Company—Voluntary Winding-up—Repayment by Director—Bonus improperly declared—Delusive Balance-sheet—Profits—Companies Act, 1862, *ss.* 138, 165.

The Court has summary power in a voluntary winding-up, on the application of the liquidator, to make an order under the 138th and 165th sections of the *Companies Act*, 1862, calling upon a director to repay a dividend of bonus declared and paid to him under a delusive balance-sheet.

In such a case where a bonus was declared and credited to a director against arrears of calls then due from him, it was held a payment within the section.

Where directors, after proper investigation of the financial position of the company, declare, and the shareholders agree to, a dividend or bonus, the Court will not lightly interfere with the payment of such dividend or bonus, on the ground that the estimates on which it was founded have turned out to be erroneous. But where the directors declare a dividend or bonus without proper investigation or professional assistance, and it is afterwards called in question, the burden lies on them to shew that it was fairly paid out of profits; and if they are unable to do so, the Court will order them to refund what they have received.

The directors of a *Marine Insurance Company* declared a bonus of 10*s.* per share, which was agreed to at a general meeting and paid. The directors prepared no profit-and-loss account, but only an account of the receipts and payments of the company, which made no allowance for the risks to which the company was liable. The company having resolved to wind up voluntarily:—

Held (reversing the decision of the Master of the Rolls), that an order ought to be made on a director to repay the bonus paid to him.

THIS was an appeal from a decision of the Master of the Rolls, made in the winding-up of the *County Marine Insurance Company, Limited.*

The company was registered under the *Companies Act*, 1862, on the 13th of November, 1866. The capital consisted of 25,000 shares of £4 each, of which £2 were to be paid on allotment. The principal articles of association, which were referred to in the argument, were as follows:—

Art. 111. The directors shall cause to be kept, in and according to the mercantile manner and system, full and true accounts of the paid-up capital for the time being of the company, and the

receipt and expenditure of all moneys received and expended by the company, and generally of all its affairs, transactions, and engagements, and of the profit or loss resulting therefrom, and of all such things as shall be requisite to exhibit the true financial condition of the company.

Art. 112. At the first ordinary general meeting of every year the directors shall lay before the company a report comprising a balance-sheet, shewing, as accurately as circumstances will permit, the financial position of the company up to a date to be therein mentioned, and which shall be as near the day of meeting as can conveniently be fixed.

Art. 123. The expenditure of the company shall be charged to capital or revenue as the directors shall from time to time determine, and whenever the directors shall think it desirable that any part of the assets shall be divided or distributed between the members by way of dividend or bonus, they may recommend payment thereof accordingly, and with the consent of a general meeting cause the same to be paid.

The company commenced business immediately after its incorporation, Mr. *Cornelius Walford* being the managing director.

In the early part of the year 1867, the *Accidental Death Insurance Company*, with the management of which Mr. *C. Walford* was also connected, entered into negotiations with the *County Marine Company* for transferring to them certain mariners' life and marine casualty policies effected by the *Accidental Death Company*, and it was ultimately agreed that the *County Marine Company* should, from the 21st of January, 1867, take upon itself the obligation of such policies, and should indemnify the *Accidental Death Company*; in consideration of which the *Accidental Death Company* should pay the *County Marine Company* £2000; but £500, part of that sum, was to be retained by the *Accidental Death Company* as the consideration for making over to the *County Marine Company* the goodwill of that branch of their business. This agreement was not reduced into writing till the 11th of November, 1867, but £500, in part performance of it, was paid to the *County Marine Company* on the 29th of January, 1867, and £500 on the 27th of February following. The remaining £500 was to be paid on the 31st of December, 1867, but was

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never paid by reason of the insolvency of the *Accidental Death Company.*

On the 8th of October, 1867, a general meeting of the *County Marine Company* was held. The notice stated that the meeting was held to receive the report of the directors, to pass the accounts from the commencement of business to the 30th of June, 1867, for the declaration of a dividend or bonus, and for the election of directors and auditors. A preliminary balance-sheet was laid before the shareholders in the following form:—

PRELIMINARY BALANCE-SHEET FROM THE COMMENCEMENT OF THE COMPANY TO JUNE 30, 1867.

Dr.

	£ s. d.	£ s. d.
Capital of the company, of which there are subscribed 1985 shares. Received on ditto ..	..	1288 18 5
To Premiums received:		
Underwriting department	915 9 0	
Less brokerage, &c.	132 1 1	
		783 7 11
To Premiums received:		
Mariners' lives	2437 18 8	
Less allowances	32 16 5	
		2405 2 3
To Sundry creditors	..	69 14 7
		£4547 3 2

Cr.

	£ s. d.	£ s. d.
Preliminary Expenses	..	144 0 0
Claims and Returns (Marine)	..	147 0 3
Re-insurances (Marine)	..	124 8 10
Rent	23 15 0	
Stationery and Books	54 8 4	
Salaries and Directors' Fees	753 6 8	
Postage, Offices, &c.	42 1 9	
Liverpool Agency	50 0 0	
		923 11 9
Investments:		
Cash and Stamps in hand	9 2 6	
On Deposit	1000 0 0	
Furniture	48 16 6	
In hands of Agents, Brokers, and others ..	1527 3 11	
Sundry Debtors	56 14 10	
Balance at Bankers	566 4 7	
		3208 2 4
		£4547 3 2

At the same time the directors laid before the meeting the following report:—

"The preliminary arrangements incident to the formation of this company being completed, the directors have thought it desirable to place before the proprietors a statement of accounts from the commencement of business to the 30th of June last. It will be seen that the transactions of the company up to that date have been on a very limited scale, the directors having urged upon the underwriter the importance of extreme caution during the late commercial depression. The losses of the company have, however, been small in a corresponding degree. The business is now on the increase, but the underwriter still prefers writing a small and select account. It is proposed to declare a bonus of 10*s.* per share, which will be added to the amount paid upon the shares."

A resolution was passed by the meeting for dividing a bonus, as recommended by the report. No profit and loss account was presented to the meeting, nor had any been prepared by the directors. Nor did it appear that any formal resolution had been passed by the board of directors to recommend the bonus.

In pursuance of this resolution the directors divided a sum of £1072 10*s.* among the shareholders, which was credited to their account in the proportion of 10*s.* to each share. At that time Mr. *J. Rance* was a director of the company, and held 250 shares, on which he had paid £125, leaving £375 due from him in respect of the allotment money. Against this he was credited with £125 in the books of the company, as the amount of his share of the bonus.

In the month of December, 1867, the directors determined to get rid of the mariners' life and marine casualty policies, and they accordingly transferred such of those policies as were still subsisting to the *Colonial Insurance Corporation*, of which Mr. *C. Walford* was also managing director, and paid that company a sum of £1013 for relieving them from all liabilities thereon.

In the month of May, 1869, resolutions were passed for a voluntary winding-up of the *County Marine Company*. The liquidator took out a summons against Mr. *Rance*, calling upon him, as one of the directors of the company, to refund the sum of £125, being the bonus received by him in October, 1867, on the ground that the bonus was paid out of the capital, and not out of the profits of the

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company, and that the declaration of it was beyond the power of the directors.

The liquidator filed an affidavit, in which he stated that the marine risks of the company, at the date of the meeting, were for an amount of about £22,000, to insure which they had received about £667, in addition to which there were the risks of the mariners' life and marine casualty policies, which they had taken from the *Accidental Death Company*, and which were supposed to be covered by the money received from that company. The sum of £2405 2*s.* 3*d.* mentioned in the preliminary balance-sheet as having been received for premiums on mariners' lives, included the £2000 agreed to be paid by the *Accidental Death Company*, although of that sum £1000 only had been really paid, £500 being allowed for goodwill, and the remaining £500 being still due as before stated. He also stated that in the actual result there turned out to be a loss of £682 3*s.* 7*d.* on the business transacted by the company before the 30th of June, 1867.

On the other hand the managing director, Mr. *C. Walford*, made an affidavit, in which he said: "Although at the time of making up the preliminary balance-sheet to the 30th of June, 1867, no profit and loss account was actually made out, yet the figures were carefully gone into and considered, and the assets and liabilities of the company carefully estimated; and with regard to the latter I say that I and the underwriter of the said company made what we considered to be a fair provision for all losses likely to arise, as well on marine as mariners' life and marine casualty policies, and that there was then, after making such provision, quite sufficient assets to declare a bonus of 10*s.* per share."

He then set out what he considered would have been a fair profit and loss account up to the 30th of June, 1867, shewing a balance profit of £1072 12*s.* 2*d.*, and he explained that in making out such account it was according to the custom of other companies that the debits for preliminary expenses, fixtures, and for the goodwill of the *Accidental Death Company*, should be spread over a period of five years, and the debit for stationery over a period of three years; and that it was fair and proper on the other hand that the company should be credited, not only with the sum of £1000 paid by the *Accidental Death Company*, but also

with the sum of £500 then due from that company, inasmuch as there was no reason to suppose at that time that the company would be insolvent. In this account the probable claims on marine policies were estimated at £170 13*s.*, and on mariners' life policies at £650.

The Master of the Rolls was of opinion that, although the declaration of the bonus was not justified by the state of the company, yet there was no proof that the directors had not acted *bonâ fide*, and accordingly dismissed the summons (1). From this decision the liquidator appealed.

(1) 1870. Nov. 4.

LORD ROMILLY, M.R.:—

This is a summons taken out by the liquidator to compel Mr. *Rance*, who was a director and shareholder of the company, to refund the sum of £125, being the bonus received by him in October, 1867, and which he took part in declaring.

The general ground upon which the repayment is required is, that at the time when the bonus was declared, so far from there being any profit made by the company, if it had been wound up at that time the probable result would have been that the company would have appeared to be insolvent to the extent of £680 and upwards. This, of course, is a representative case, and if Mr. *Rance* is compelled to repay this amount, many others will also be so compelled, and it will apply probably not merely to those who declared the bonus, but also to those who received it.

Although it may not be always of easy application, the principle which governs cases of this description is very clearly established by all the cases. When an improper payment has been made, if it be a mere error of judgment, it cannot be recovered; if it be a fraudulent payment, then it can. These words however, "*bonâ fide* payment" and "fraudulent payment," are found in use to be somewhat vague terms, and it becomes necessary therefore in the present case that I should state in what sense I use the words, and then I must proceed to examine the facts of the case for the purpose of ascertaining within which of these two descriptions this transaction ought properly to be classed.

By a fraudulent payment, which for this purpose includes the declaration of the bonus which creates the payment, I mean one where the person who makes it, or who is concerned in making it, is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself. All other payments must be treated as *bonâ fide*. It is to be observed that in so using the expression, I mean to confine what I am now stating to payments made by directors of joint stock companies, or the officers of the company having power and authority so to do. The difficulty in applying such a rule as this consists in the proper meaning to be given to the words "that the directors at the time knew the payment ought not to be made." The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him he is equally guilty. For instance, if a report has been laid before him on the state of the society shewing that the

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Mr. *Swanston*, Q.C., and Mr. *Cozens-Hardy*, for the Appellant:—

We contend that the bonus is money improperly retained by a director, within the 165th section of the *Companies Act*, 1862.

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state of the funds is such as not to admit of such a bonus being made, and if, suspecting such to be the case, he refuses to examine the report until after the declaration of the bonus, then he is, in my opinion, equally liable as if he had previously read and examined the report. But if before declaring the bonus he reads the report, examines the books, and finds good reason for what appears there, or from the advice of some competent person whom he has consulted, is induced to trust the accuracy of the statement made in the report, then he is, in my opinion, absolved from liability for the payment. If the report be made by a competent person free from all suspicion, he is not, in my opinion, bound to examine into the accuracy of the report itself; but if the report be made by a competent person, duly employed for the purpose, even if it be erroneous, if the director is deceived by it, if he acts upon it believing it to be true, however improper the payment may be, still he is not liable as in the case of a fraudulent payment; nor is he, although he, in common with the other shareholders, participates in the benefits to be derived from the declaration of the bonus. Therefore, in such cases, he would not be liable to refund. Any other doctrine would, as it appears to me, be quite alien to the spirit of the Act of Parliament in question, and also quite opposed to the doctrines of equity as administered by this Court. In order to make directors liable in a case like this there must be either proof of distinct fraud or else of such gross and wilful negligence as is equivalent to fraud. It remains to see how far the facts in this case bring the matter within either of the cases I have suggested.

[His Lordship then referred to the evidence in the case, and continued:—] I have looked into this as carefully as I can, and after careful investigation of the matter as far as I am able to judge, I think the declaration of the bonus was an improper proceeding, and that there did not exist at that time a probability of any profit, but that there was a probability of a considerable loss if the company had then been wound up. But of this I am quite clear, that it was not an easy matter to discover, as, in fact, it rarely is in these insurance cases, and that it required a very careful investigation of the matter by competent persons to come to an accurate conclusion. In these cases of insurance, where the duration of the insurance has to be taken into account, and the probable risk varies very much, it is extremely difficult to ascertain what the exact state of the company is, and I think it might be reasonably disputed by competent persons that the company was then in the state which the liquidator represents it as being. This is the strange part of the case, that there is not throughout this case the slightest trace of the directors having made the payment or declared the bonus knowing that it was improper or that they entertained any suspicion of such being the case: nor is there the slightest suspicion that any individual benefit was obtained by any one of them in the matter. And in this case the competent advisers who conducted the

Stringer's Case (1) is a distinct authority that such a case may be dealt with under that section in a compulsory winding-up, and the 138th section gives power to the Court, on application being made to it, to exercise all the powers which it might exercise in a compulsory winding-up: *In re Bank of Gibraltar and Malta* (2).

It is contended on the other side that this sum was never actually paid to Mr. *Rance*, but it appears from the accounts that he was indebted at that time to the company, and that part of his debt was written off to the amount of the bonus. That amounted to an actual payment. And the intention of the parties is made more clear by the fact that instructions were given to the bankers of the company to enter the amount on both sides of the account, as money received by Mr. *Rance* and repaid by him to the company.

When the circumstances under which the bonus was declared are considered, there can be no doubt of its impropriety. No profit-and-loss account in ordinary mercantile form, as prescribed

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affairs of the company recommended them, and did so after advice and after carefully examining the state of the company—in which opinion they still concur. It is also to be observed that they did not get the £500 from the *Accidental Death Company*. The impropriety of the bonus is not, as appears to me, an obvious result of the account laid before the meeting, nor does any one at the meeting appear to have pointed out or suspected that it was not a fit and proper proceeding. To compel the repayment of money paid or credited under such circumstances would, in my opinion, lead to very serious and, as I believe, disastrous results. A transaction which at the time seemed to be perfectly fair and proper, might from the light to be derived from subsequent events, be shewn to have been a most rash and inexpedient proceeding; but if the directors who ordered it, and the shareholders who sanctioned it, and who are afterwards called upon to make good the injury they sustained, were of opinion upon the facts stated before them that it ought properly to be made, then, in my opinion, it cannot afterwards be disturbed. If it were not so, it would not be possible for any company to be safely or usefully conducted.

No one can contend who reads these articles, that if the state of the company warranted it, the directors had not the power to declare the bonus, and it would come ultimately to this, that what a director does is done at his own risk, and if it turns out successful no objection will be made, but if it proves a failure he must bear the risk occasioned by the act which he recommended believing it to be a proper one. The result is, that I think this summons must be dismissed, and I think the costs of all parties must be paid out of the estate. I do not think I can make anybody personally pay the costs.

(1) Law Rep. 4 Ch. 475.

(2) Ibid. 1 Ch. 69.

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by the 111th and 112th clauses of the articles of association, was laid before the meeting, nor even made out for the guidance of the directors.

The only balance-sheet produced was a merely speculative one, made without regard to the risks to which the company was liable, from which no idea could be formed of the condition of the company. The bonus was, in fact, paid out of capital, and not out of profits.

Mr. *Jessel*, Q.C., and Mr. *W. C. Fooks*, for Mr. *Rance*:—

The Court has no jurisdiction to make the order asked for on this summons. The 101st section of the *Companies Act*, 1862, is out of the question, because it only applies to those who have been placed on the list of contributories, which Mr. *Rance* has not been. With respect to the 165th section, *Stringer's Case* (1) is not a binding authority on this point, for the application in that case was dismissed on the merits, and the observations of the Judges relied on by the other side were merely *obiter dicta*. But, assuming those *dicta* to be binding, the 165th section is not applicable to the present case for several reasons. In the first place, that section only refers to a compulsory winding-up. It is true that the 138th section gives power to the Court to decide questions in a voluntary winding-up, when applied to, but that only has reference to questions between contributories. The liquidator represents the shareholders only; he cannot call on the Court to exercise its powers on behalf of creditors: *Waterhouse* v. *Jamieson* (2). The proper course for a creditor is to obtain a supervision order. In the second place, the 165th section only enables the Court to exercise its power against a person in his capacity of director or other officer. But the bonus was not credited to Mr. *Rance* as a director, but simply as a shareholder. Thirdly, there was no payment to him at all, and therefore there is nothing to repay. The object of the 165th section was to recover from the officers of the company any part of the assets in their hands. Mr. *Rance* has received none of the assets, and if the bonus was improperly declared all that the Court can do is to strike out the sum credited to him, and make him responsible for the whole amount of the

(1) Law Rep. 4 Ch. 475. (2) Law Rep. 2 H. L., Sc. 29.

calls. Even in a case of compulsory winding-up, the Court will only exercise its powers under the 165th section in a simple case: *In re Bank of Gibraltar and Malta* (1); *Feltom's Executors Case* (2).

With respect to the declaration of the bonus, we contend that it was not improperly declared, taking into consideration the knowledge which the directors then had of the state of the company. Directors cannot be called to account unless *mala fides* is shewn. It is not enough to shew that the matter turned out unfortunately: *In re European Life Assurance Company* (3); *Turquand* v. *Marshall* (4).

The arrangement with the *Accidental Death Company* was an independent transaction, and the directors were entitled to divide the profits made by it. They reserved the premiums on the current policies to pay the current risks, and that was all they were bound to do. When the liquidator made out his account he knew that the *Accidental Death Company* had made default in payment of the £500 due from them. But the directors did not know that there would be any default, and as the money had become due from the company before the 30th of June, although not payable till a future date, they were entitled to include it as an asset.

Mr. *Swanston*, in reply, referred to the observations of Lord Justice *Turner* in the *Bank of Gibraltar and Malta* (5), and of Lord Justice *Rolt* in *In re Beaujolais Wine Company* (6), on the power of the Court to interfere in cases of purely voluntary winding-up.

SIR W. M. JAMES, L.J.:—

This is an application by way of appeal from an order of the Master of the Rolls, and it asks that the Respondent, who was a director of the *County Marine Insurance Company, Limited*, should pay a sum of £125, the amount of a bonus paid or credited to him in the month of October, 1870.

The case has been argued very fully and very elaborately, and I am not prepared to say that it has been argued more fully

(1) Law Rep. 1 Ch. 69. 11 Jur. N.S. 916
(2) Ibid. 1 Eq. 219. 12 Jur. N.S. 201
(3) Ibid. 9 Eq. 122.
(4) Law Rep. 4 Ch. 376.
(5) Ibid. 1 Ch. 73. 11 Jur. N.S. 917
(6) Ibid. 3 Ch. 15, 25.

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or elaborately than the importance of the case to the parties required.

Various objections have been taken to the jurisdiction of the Court and to the form of the summons involving a question of jurisdiction as well as objections on the merits of the case. The contention on the part of the liquidator is that the Court has jurisdiction under the combined operation of the 138th and 165th sections of the *Companies Act*, 1862, to determine this question in a voluntary winding-up. The matter has been not exactly, but very nearly or substantially, in that form before the Court on several occasions. The principal authority upon the subject is the decision in *Stringer's Case* (1), which is a very authoritative decision, and not the less authoritative because it was not essential to the proper disposal of the case to decide the point. The case proceeded afterwards upon the merits upon which the decision of the Court was an affirmance of the judgment of the Court below. In the Court below the decision had been based entirely upon the conclusion which the Vice-Chancellor had come to—that there was no jurisdiction in this Court; and, that being a question of very great importance and involving many grave considerations, the Lords Justices thought it their duty to go into the question so as to lay down clearly, distinctly, and in my judgment decisively, what the law was with respect to the construction of the 165th section in the case of a company winding up under the supervision of the Court. It is, however, contended that although it was decided in that case that the Court, in a matter of a similar character to the present, had jurisdiction in the case of a company being wound up, compulsorily or under supervision, yet it has no such jurisdiction in the case of a company being wound up voluntarily. It appears, however, that in one or two of the earlier cases the Court seemed to think, rightly or wrongly, that there was no such distinction between a voluntary winding-up and a winding-up under supervision. I think that the case of *In re Bank of Gibraltar and Malta* (2) is as striking an example in that respect as we could have; because there the Court declined to accede to the application for a supervision order, expressly on the ground that whatever was the jurisdiction of the Court under the supervision order, would be the

(1) Law Rep. 4 Ch. 475. (2) Law Rep. 1 Ch. 69.

jurisdiction of the Court under a voluntary winding-up. And the same opinion was expressed by Lord Justice *Rolt*, in the case of *In re Beaujolais Wine Company* (1), although the point did not come before him exactly in the same shape. That would seem to result in this, that the object of the Act was that a company and its creditors should be left, if possible, to settle their affairs without coming to the Court at all, either for a compulsory winding-up or for a winding-up under supervision, but to provide them, under the 138th section, with the means of access to this Court whenever any question arose, in the course of the voluntary winding-up, just in the same way as when any question arose in the case of a compulsory winding-up or under supervision. And for myself, if it were an original matter, I should be inclined to take the same view of the Act. No doubt if a liquidator did not do his duty, if he did not take the opinion of the Court in such a case as this, for example, it would be in the power of a creditor to apply to this Court for a proper order which would give him some opportunity of obtaining the decision of the Court; but if a liquidator is minded to bring a matter before the Court under the 138th section, I do not myself see the reason why the question should not be determined without obliging the contributories to present a petition for a compulsory winding-up or a supervision order, which would only lead to increased expense. It appears to me, therefore, that the Court has jurisdiction under the 138th and 165th sections. I do not refer to the 101st section, because I think that there is a technical objection to the application of that section on the ground that it requires, as a preliminary condition, that the shareholder against whom the order is sought to be made shall be settled on the list of contributories, which has not been done in the present case. The present application is made against a person who is, under the 165th section, liable as a director.

Then, assuming the liquidator to be right in his contention that this was an improper transaction altogether, it is contended that this was not a sum paid to, or coming into, the hands of a director for which he is accountable to the company, because, in truth, all it amounted to was writing off a debt in respect of calls, and the true course would be to declare that the transaction was wholly

(1) Law Rep. 3 Ch. 25.

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void, and so leave the contributory liable to the unpaid calls; and, at first sight, there appeared to be something in that argument. That, probably, might be a proper thing to do, but I think it does not lie in this gentleman's mouth to say that it was not a payment to him for all purposes. He owes money to the company; the company declare a bonus; he accepts that bonus, and with that bonus pays off a part of his debt. It now appears that the form was gone through of some instructions being given to the bankers to pay him, and the bankers receiving the money from him, on the one hand, and paying it to the company on the other; so that, in form as well as in substance, the payment was to him. I do not rely upon that, but I say that, in truth and in substance, a bonus declared in favour of a man, and applied in payment of a just debt due from him, whether to the company or to any one else, is money paid to him; and the question is, whether that money was money of the company which was improperly paid to him.

Now, with regard to the propriety or impropriety of the transaction, it appears to me to be one of the most startling and improper proceedings that ever came under my notice. The company was a company formed for marine and other insurances. Subsequently the directors took in life assurances, but they seem to have begun with marine insurances. The company had been in existence for only eight months when a bonus of 10*s.* per share was declared, a bonus which, of course, could only be lawfully made out of moneys which had been earned, or believed to have been earned, in the way of profit. Independently of one particular item which I have severed from the rest, as it has been severed in the course of the argument, the business of the marine insurance proper was this: They had received for premiums £783 7*s.* 11*d.*, and out of that they had expended in re-insurances £124 8*s.* 10*d.* There had been marine claims actually ripening into demands amounting to £147. Then they had spent in preliminary expenses £144, which they say might have been spread over a certain number of years. They had spent in stationery and books £54 8*s.* 4*d.*, which they seek to divide in the same way. Besides those, there were actual current expenses which could by no possibility be spread over any period in that way—such as rent, £23 15*s.*; salaries and directors' fees,

£753 6*s.* 8*d.*; postage, office, and travelling expenses, £42 1*s.* 9*d.*; fixtures, &c., for office at *Liverpool*, £50—so that, in truth, there was nearly £800 which had been actually expended in annual expenses, and their gross premiums to cover the risks which were coming on in future were only the sums which I have stated. But then it is said that they had made a bargain with another insurance office to take off their hands a number of policies. The policies had been going on for some time, and, of course, the annual premiums would not be the proper compensation for the risks to be incurred. The two companies, in one of which Mr. *Walford*, who speaks to these transactions, was the managing director, and in the other was connected with the management, therefore agreed that £2000 was the proper compensation to be given to the one company for taking over the onerous policies of the other; in other words, that the premiums were not worth the risk by the sum of £2000. And it was further agreed that the £2000 should be paid in this way, namely, £1000 to be paid at once, £500 at Christmas, and £500 to be set against the goodwill, as it was called, of this transferred business. It appears also, that upon this transaction they received premiums amounting to £405 2*s.* 3*d.* Then they say, that out of the profits of that transaction they were justified in making a division by way of bonus of £1000. How was this done? Was there any attempt to make a balance-sheet or any profit-and-loss account in such a way as any mercantile body, and certainly any insurance company, ought to have done? To take the money which the company had received to answer risks, and to treat it as money capable of being divided as profits, without making any estimate of what the risks were in respect of which the money was paid, seems to me to be the most extravagant proceeding that I ever heard of. The directors simply had before them the cash balance of the receipts and payments, and, without making the slightest provision in that account for anything whatever, they proceed out of that balance to declare this bonus. I quite agree that it would have been different if there had been, as there ought to have been in the ordinary course of business, a balance-sheet *bonâ fide* made out with proper assistance, so as to ascertain the true state of the company. If the directors had followed the directions of the 112th article of their own deed, and

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if at the first ordinary general meeting they had laid before the company a report comprising a balance-sheet shewing, as accurately as circumstances would permit, the financial position of the company up to that date—if that had been done, I am of opinion that it would not be right for this Court to sit as a Court of Appeal to decide upon such a state of facts so made out. If the directors, by placing unfounded reliance upon the representations of their servants or actuaries, had arrived at the conclusion that they had made a divisible profit, this Court ought not, I say, to sit as a Court of Appeal from that conclusion, although it might afterwards be satisfactorily proved that there were very great errors in the accounts which would not have occurred if they had been made out with greater strictness or with more scrutinising care. But no such account at all was made out. A mere cash account or balance-sheet in such a company as this, presented in order to determine whether there had been a profit made, and for the purpose of declaring a bonus thereon, is, to my mind, within the meaning of *Stringer's Case* (1), a fraudulent and delusive balance-sheet. It purported to shew something, as was said in that case, which any man who applied his mind to the subject would say afforded no clue whatever to the profit which had been made. They might as well have put before the meeting a sheet out of a newspaper. An attempt is made by the managing director to justify it in this way: The respondent himself has not ventured to pledge his oath to the fact that he ever applied his mind to the question whether there was any profit or loss made, or that he believed there was such a profit as to justify the payment of that bonus. But Mr. *Walford*, the managing director, says this:—[His Lordship then read the paragraph from the affidavit of Mr. *Walford* set forth above, and continued:—]

Whatever estimate was made was in Mr. *Walford's* own mind, and was never before the directors at all, but, notwithstanding this, Mr. *Walford* contends that he was fully warranted in recommending the bonus, because the transaction with the *Accidental Death Insurance Company* was so profitable. He says they received £415 in premiums, and £1000 in cash, and they were to receive £500 more, and that they afterwards, in December, sold that

(1) Law Rep. 4 Ch. 475.

business to the *Colonial Insurance Corporation*, and had not to pay so much to them as they had received from the first company. It is pretended in the account that they had received £2000, but £500 was paid for the goodwill, which would of course pass with the policies transferred to the new company. Now it is clear that this was a transaction which was only begun, and which had not ripened into any profit, at the time when this bonus was declared, and before I could have given the sanction of this Court to a division on the notion that they had made a good bargain in buying a business, I should have liked to know what the estimates were—how it was that £2000 as between the two companies, was considered as the proper sum to be paid, and yet that £1000 was considered the proper sum to be paid by some other company a few months afterwards. If the company, as is stated, sold the property in December, and thereby made a profit of £1000, that was a profit which was realised at the time the bargain was made, but I cannot allow it to be said that they were justified in dividing as profits made up to the 30th of June the result of a very favourable bargain that was made in the December following. Therefore it appears to me that the Respondent is not entitled to bring that into account, and that in truth no provision was made in the estimates for the risks they were running on the different policies. Reliance is also placed on the fact that by great good fortune the policies resulted in scarcely any substantial claim being made against them in the next year, and it is contended that they had a right to consider all that as profit made in the year during which the premiums were paid. This contention also seems to me to be perfectly idle.

I think the Master of the Rolls had not before him the figures so clearly as we have had. He seems to have thought there had been some statement laid before the directors upon which the directors had exercised their judgment as mercantile men, and had dealt with this as a mercantile matter of business, and therefore he came to the conclusion that it was not a case in which this Court could interfere. I have arrived at the conclusion that there was a gross neglect of duty on the part of the directors with respect to their conduct in declaring this bonus; and finding no justification of it from the events which have since occurred, and

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not being satisfied that any account was made out from which any mercantile man desirous of drawing up a balance on his own behalf, or on behalf of the persons for whom he was a trustee, would have been enabled to do so, and not being satisfied that any balance-sheet made on the 30th of June would have shewn any profit whatever, now that all the facts are before us, and everything has been inquired into, I am of opinion that the bonus was declared upon a delusive and fraudulent balance-sheet, within the meaning of *Stringer's Case* (1); and that this Court has jurisdiction to order, and is bound to order, that this director who has received this money on a balance-sheet drawn up in this manner, in consequence of his neglect of duty, do repay the amount to the liquidator, together with the costs of the application below.

SIR G. MELLISH, L.J.:—

I am of the same opinion. With respect to the question of jurisdiction I am of opinion that *Stringer's Case* is a direct authority, that if this was a compulsory winding-up, or a winding-up under supervision, there would be jurisdiction to entertain this application under the 165th section. It appears to me that the Lords Justices in that case directly decided that question, and I am not at all disposed to reopen it. Still it is no doubt open to argument that this jurisdiction does not extend to a voluntary winding-up. That depends upon the construction of the 138th section:—[His Lordship read the section.] *Stringer's Case* decided that if the company was being wound up by the Court, the official liquidator might make this application, and the 138th section says perfectly plainly, that where a company is being wound up voluntarily the liquidators may make an application in respect of all or any of the powers which the Court might exercise if the company were being wound up by the Court. I cannot understand why that is not according to the plain and simple meaning of the words to include the 165th section. No doubt there are these words afterwards: "And the Court, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such application." That clause does appear to make this difference, that it leaves it in

(1) Law Rep. 4 Ch. 475.

the discretion of the Court whether it will choose to entertain the application or not, but I do not see any ground why the application should not be entertained in such a case as this. I do not see that any benefit would result from compelling the creditors on whose behalf practically this application is made to go to the Court to procure the voluntary winding-up to be turned into a winding-up under supervision for the purpose of enabling this application to be made. On the contrary, the decision of the Lords Justices in *In re Bank of Gibraltar and Malta* (1) was that it was quite unnecessary to make any application to change a voluntary winding-up into a compulsory winding-up, or into a winding-up under supervision, because if any application can be made under the 165th section in the case of a winding-up under supervision the 138th section equally enables it to be made in the case of a voluntary winding-up.

The next point, which was also strongly urged, was that no money had actually been received by the Respondent: but when the facts are really looked at, it appears to me to be perfectly clear that there was what is equivalent to a receipt of money. If a sum of money with a man's consent is placed to his credit in any particular fund in which he has an interest, or is paid to any creditor of his, so as to discharge a debt or obligation due from him, that is a receipt of the money by him. Here the shareholders and this director consented that this bonus, which could only be declared according to the articles of association as a bonus to be paid out of the profits, and in money, instead of being received in money should be applied towards the payment of an obligation to which they were all subject, namely, the obligation of paying up an additional sum of 10*s.* per share. It makes no difference at all that they choose to waive the ceremony of having a formal call made. In this case the Respondent cannot even raise the contention that, there being no call, there was no debt for the 10*s.* per share, because there was an actual debt due from him to the company, and he consents to the money being applied to the payment of that debt; that, in my opinon, is a very clear receipt, on his part, of the money.

Then that brings me to consider the case upon the merits, and

(1) Law Rep. 1 Ch. 69.

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those merits unquestionably raise a very important issue. I must say that I differ from the judgment pronounced by the Master of the Rolls; but I think the difference of opinion between us has arisen mainly from the circumstance that the Master of the Rolls has not, as it appears to me, given sufficient weight to the fact that no profit-and-loss account up to a particular day was ever made out at all, and that the directors did not profess to be dividing a profit which had been earned up to a particular day. For that purpose it is important to look at the notice convening the meeting, and to the report of the directors, and the resolutions passed at that meeting. If those are looked at, it will appear that the directors never stated to the shareholders that they had made a profit, and that they did not profess to be dividing a profit. Now, this is the notice:—[His Lordship read the notice.] At the meeting the preliminary balance-sheet (which is simply a balance-sheet of alleged receipts and payments, mixing the receipts on capital account and the payments on capital account with the receipts on revenue account and the payments on revenue account, and making no allowance of any sort or kind in respect of the further or future risks) was the only account that was laid before them. This balance-sheet was laid before the secretary, together with the following report:—[His Lordship read the report.] In this report there is no statement that they had made a profit of 10*s.* per share up to the 30th of June, and it really cannot be implied. It professes, on the face of it, to be a return of capital. It does not profess to be a declaration of bonus upon profit made.

In my opinion, such a declaration of bonus without any profit or loss account having been made out is a *malâ fide* proceeding on the part of the directors within the 165th section. I quite agree that if directors or a proper actuary had made out a profit and loss account the Court ought to assume, very strongly indeed, that it was a correct account, and ought not without very strong reasons shewing that it was done *malâ fide*, to set it aside, or declare a dividend made upon it improper. But, if directors choose to declare a bonus or a dividend without making out any account at all, and if shareholders choose to vote that dividend or bonus, knowing that they have got no account before them, knowing that the directors do not even profess to have made a profit out of which that

bonus or dividend can be declared, I cannot help thinking that under those circumstances it lies on the parties who contend that such bonus or dividend was properly declared, to shew that it was made out of profits.

That being the view which I take generally of the case, I have now to consider whether it has been made out on the part of the directors that this bonus was really made out of profits. Here is an insurance company which had carried on business on a very small scale for a period of seven months, when this balance-sheet was made out. During that time the actual working expenses had very considerably exceeded the whole amount of the premiums received. Then they attempt a justification on account of this particular transaction with the *Accidental Insurance Company*. It appears to me that they cannot avail themselves of that. In the first place, no profit had really been made. They had, it is true, agreed to have paid to them a sum of £2000; but of that amount £500 was in fact to be returned for the goodwill, so that practically they were to receive £1500, and of that sum £500 was not to be paid until December. That £500 ought not to be brought into this account as a profit earned previous to the end of June. So that makes the balance-sheet £1000 wrong. Then, again, if this sum had been agreed to be paid in respect of risks, it must be taken *primâ facie* that the risks would be fully equivalent to the sum that was to be paid. It turned out afterwards, no doubt, that in respect of those particular risks very fortunately no loss occurred at all, and they were ultimately, after this bonus was declared, able for £1000 paid to another company to get those risks taken off their hands. But that was merely a subsequent bit of good luck. They had also other subsequent bits of bad luck. On the marine insurance they lost to the extent of upwards of £500, which they say was a great deal more than they had anticipated. How can you divide a profit on one part of a transaction which turned out fortunately, and then say as to the losses on the other part which turned out greater than were anticipated, you will not make any estimate at all? It appears to me that they had really substantially derived no profit at all up to that time. I do not think that Mr. *Walford's* affidavit is satisfactory in which he makes an estimate *ex post facto* of the probable losses, especially when he

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estimates those probable losses at very much less than what they ultimately turned out to be. And I think he is wrong in including in the account the sum which was to be paid for the goodwill, and in treating the sum of £500, which was not to be paid until the end of December, as a profit of the past year. Upon the principles I have mentioned, I think it incumbent on the director against whom this application is made, to shew that this bonus was really made out of profits under the circumstances under which it was made, namely, without any examination of the accounts at all. I think he has not made that out, and consequently that the order of the Master of the Rolls must be discharged, and that the order asked for ought to be made with costs in the Court below.

Solicitors for the Liquidator: Messrs. *Digby, Sharp, & Large.*
Solicitor for Mr. *Rance:* Mr. *Beddall.*

L. JJ. 1870 Nov. 21, 22; Dec. 21.

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Power of Sale with Consent of Tenant for Life—Extinction of Power to consent by Alienation of Life Estate—Vendor and Purchaser—Doubtful Title.

The trustees of settled estates had a power of sale, to be exercised at the request and direction of *H.*, the tenant for life, who was also entitled to the ultimate reversion in fee. *H.* made an absolute conveyance of all his interest to *A.* for value. Subsequently the trustees, by the direction of *H.*, purported to exercise the power of sale by conveying the estates to *A*:—

Held (reversing the decision of the Master of the Rolls), that *H.'s* power to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee:

Held, also, that there was nothing in the sale of the interest of the tenant for life, and the subsequent exercise of the power of sale to the assignee of the life interest, to raise suspicion of *mala fides*, or to put a purchaser on inquiry.

Observations on the duty of the Court to decide doubtful points of title in suits for specific performance.

THIS was an appeal from a decree of the Master of the Rolls dismissing the Plaintiff's bill with costs.

By an indenture of settlement made on the marriage of *W. H. Hicks*, certain freehold estate was conveyed to trustees and their

heirs, to the use of *W. H. Hicks* for life, with remainder (subject to powers for raising money for the benefit of *W. H. Hicks*, and for jointuring), to certain uses in favour of the children of *W. H. Hicks*, with an ultimate limitation in default of issue to *W. H. Hicks* in fee. And it was thereby declared that it should be lawful for the trustees during the life of *W. H. Hicks*, at and by his request and direction in writing, to dispose of by way of absolute sale or of exchange, all or any part of the said hereditaments thereby conveyed to any person or persons whomsoever, for such price as to them the said trustees should seem reasonable.

There was no issue of the marriage, and the jointuring powers were not exercised.

By an indenture of the 29th of October, 1862, *W. H. Hicks* conveyed the settled property for valuable consideration "unto and to the use of the Plaintiff, his heirs and assigns, for the life of the said *W. H. Hicks*, and further, for and during every other estate and interest which the said *W. H. Hicks* then had or could dispose of by the now stating indenture, both at Law and in Equity, and whether present or future, vested, executory, contingent, or otherwise howsoever."

In August, 1866, new trustees were appointed; and by an indenture of the 27th of March, 1868, purporting to be in exercise of the power of sale vested in the trustees of the settlement, the new trustees, at the request and by the direction of *W. H. Hicks*, revoked the uses of the settlement and conveyed the property, in consideration of the sum of £19,000, to the Plaintiff in fee.

In 1869 the property was put up for auction by the Plaintiff in several lots, and the Defendant was declared the purchaser for £21,000, but he refused to accept the title on the ground that the power was not duly exercised, inasmuch as *W. H. Hicks*, the tenant for life under the settlement, had, by the deed of the 29th of October, 1862, conveyed away to the Plaintiff all his estate and interest, and that therefore his power derived under the settlement of directing or consenting to a sale under the trusts had determined. He also objected that the power was executed rather for the purpose of completing pre-existing arrangements between the tenant for life and the present vendor, than in the actual exercise of the trustees'

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discretion. The Plaintiff filed his bill for specific performance. The Master of the Rolls dismissed the bill, being of opinion that this power could not be exercised after the alienation of the life estate (1). The Plaintiff appealed.

(1) 1870. Mar. 9.

LORD ROMILLY, M.R.:—

The question in this case is, whether a tenant for life, who has sold his estate and the ultimate reversion to a purchaser for value, can, at the request of the alienee, exercise his power of sale? It is clear that he cannot exercise the power of sale without the assent of the purchaser, because no man can derogate from his own grant.

The Defendant objects that the sale by the trustees to the Plaintiff, at the request and by the desire of *Hicks*, after *Hicks* had sold all his interest under the settlement, was a fraud on the power and casts a blot on the title. The question is, whether this is a title which the Court can compel the Defendant to accept.

I think that the title is too doubtful to compel the Defendant to accept it. In saying this I do not adopt the expression frequently cited to me, that the Court will abstain from compelling a Defendant to accept a title where, though the point is doubtful, the Court is of opinion that the objection is bad; but, upon fully considering this case, I have found myself compelled to come to the conclusion that if it were absolutely necessary to decide the point between adverse claimants, I should hold the objection to be valid.

I do not think that this case is affected by recent decisions, as that of the House of Lords in *Long* v. *Rankin* (*Sug.* on Powers, 8th Ed. p. 63), where the tenant for life had conveyed his estate for the purpose of securing an annuity for his life, and had expressly reserved his powers of leasing. The question there turned on this, whether the exercise of that power was derogatory to his grant, and it was held not to be so, but to be for the benefit of all persons interested in the enjoyment of the estate.

But here the opposite principle appears to me to arise. The only application of that case to the present is, that the tenant for life could not require the trustees to exercise the power of sale without the consent of his assignee. But the question in reality here is, whether the Plaintiff can require the tenant for life to call on the trustees to exercise this power for the benefit, and, in fact, at the suggestion, of the Plaintiff. As long as the tenant for life is the owner of the property for the period of his life, it is obvious that it must be for his interest that the property should be sold in such a manner and at such a time as to secure the highest price; but when he has sold his life interest and his reversion to a stranger it is to him a mere matter of indifference at what time or in what manner or for what price the estate is sold; and if it can be so managed that it can be bought by the purchaser of the life interest he acquires an advantage, as indeed is shewn in the present case, where the sale to the Defendant is at a considerably advanced price over the price that was given for it by the Plaintiff.

The time and mode of sale is, in fact, intrusted to the tenant for life, because it is inferred that he will do what he can to protect his own interest, and in so doing to protect the interests

Mr. *Jessel*, Q.C., and Mr. *Wickens*, for the Appellant:—

With respect to the first objection, we contend that the power to consent was not destroyed by the alienation of the life estate. We admit that it could not be exercised by the tenant for life to the prejudice of the alienee, but with his concurrence it was well exercised.

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of the persons in remainder; but the moment that his interest ceases then he may collude with the alienee to the injury and detriment of the person in remainder. I do not charge or suspect anything of that sort in this case, but I state it in order to shew the reason of the rule, and why such an exercise of the power may reasonably be considered as a fraud on the power.

It seems to be quite settled by authority that an absolute alienation of the life estate by sale takes away from the tenant for life the powers of leasing. How does the power of sale in substance differ from this? It is, no doubt, difficult to see how in a Court of Law any distinction can exist between a conveyance of the life estate by way of security or by way of mortgage, and a conveyance by way of absolute sale; and yet it seems to me to be obvious that a power of sale is given to a tenant for life by reason of his being tenant for life, as I have already stated; and I have in vain searched for any case where the Court has held such a power capable of being exercised where there has been an absolute sale of the life estate. In this case, not only is the life estate sold, but the reversion also is sold, and all interest of *Hicks* in the estate is absolutely gone.

The cases of *Tyrrell* v. *Marsh* (3 Bing. 31), *Davies* v. *Bush* (M'Cl. & Y. 58), and *Walmesley* v. *Butterworth* (*Coote* on Mortgages, 3rd Ed. p. 572), are all cases of mortgages.

It does not appear to me to be a matter of technicality, but one of substance. Here the settlor settles an estate on *A.* for life, with remainder to his issue, and in default of such issue to *A.* in fee; and he gives *A.* a power of sale. I call it a power of sale to him, though it is in fact a power of sale to the trustees, to be exercised at his request and by his direction in writing, for that, in my opinion, does not for the present purpose differ from a power of sale given to him alone. *A.* sells all his interest. Surely the intention of the settlor was, that the power of sale should thereupon become incapable of being exercised, for he could never have meant that the tenant for life, when he had become a mere stranger without any interest in the property, should be able so to sell it as to deprive his issue of the full value of the estate.

It is true that, if there be an ingredient of fraud or collusion, the sale might be set aside on other grounds, but the difficulties attendant on or of detecting and proving this are a sufficient reason to induce a settlor not to give such a power to a mere stranger, but to restrict its exercise, so that it may be inseparable from the estate of the tenant for life, and that when he parts with that estate the power may be extinguished. It appears to me that, if I were to decide in favour of the Plaintiff, I should be going a step farther than any case has hitherto gone, and a step which the facts of this case shew would be likely to lead to serious evil and inconvenience. I must dismiss the bill with costs, if the costs are not arranged.

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In the case of *Long* v. *Rankin* in the House of Lords, in 1822 (1), a tenant for life with a leasing power conveyed away his life estate to secure an annuity, and afterwards granted a lease, and it was held that the power was not so inseparably annexed to the life estate as to prevent the tenant for life from executing it. The question of the extinguishment of powers is fully considered by Lord *St. Leonards* in his work on Powers (2), where he refers to the cases of *Tyrrell* v. *Marsh* (3), *Davies* v. *Bush* (4), and *Walmesley* v. *Butterworth* (5); and though there are some observations in the text that appear to favour the Defendant's contention, yet they are not supported by the case of *Long* v. *Rankin*.

The same doctrine was recognised in *Warburton* v. *Farn* (6), *Holdsworth* v. *Goose* (7), and *Eisdale* v. *Hammersley* (8); and in a very recent case, *Simpson* v. *Bathurst* (9), the power of a tenant for life to grant leases was held to remain in him, notwithstanding bankruptcy. The present case is stronger, for it is not a power of sale, but simply of consenting to a sale by the trustees, which is different from a legal power, and is simply a qualification of the power of the trustees. It is not given to the tenant for life during his life estate, but during his life; and is not intended for the protection of the remainderman, but of the tenant for life and his assigns: *Lee* v. *Ashburton* (10).

With respect to the second objection, there is nothing in the deeds, or in what has taken place, to entitle the purchaser to inquire whether there was any want of *bona fides* in the transaction, or whether the discretion of the trustees was fairly exercised. Mere suspicion is not notice which can affect a title: *Howard* v. *Ducane* (11).

It will be said by the Respondent that the Court of Appeal will not force a title on a purchaser which the Court below has held to be bad. But if the Court of Appeal does not itself think the title doubtful, it is its duty to decide the case as between vendor and

(1) Sug. on Powers, 8th Ed. pp. 63, 895.
(2) Pages 58–70.
(3) 3 Bing. 31.
(4) M'Cl. & Y. 58.
(5) Coote on Mortgages, 3rd Ed. p. 572.
(6) 16 Sim. 625.
(7) 29 Beav. 111.
(8) 31 Beav. 255.
(9) Law Rep. 5 Ch. 193.
(10) 11 Beav. 470.
(11) T. & R. 81.

purchaser, whatever the opinion of the Court below may have been: *Beioley* v. *Carter* (1).

Mr. *Joshua Williams*, Q.C., and Mr. *Rodwell*, for the Defendant:—

There can be no doubt that it was the intention of *Hicks*, when he sold the estate to the Plaintiff, to extinguish his power of consenting, and to give an estate in fee without incumbrance, subject only to the contingency of his having issue. If he had used express words releasing his power of consenting, the power would have been lost, and the same construction will be put upon the deed, although no express words are used if the intention is clear.

The power being appendant to the estate is destroyed by the entire alienation of the estate: *Bringloe* v. *Goodson* (2). All the cases cited refer to partial alienation. *Simpson* v. *Bathurst* (3) is no exception to this, for the estate of a bankrupt only vests in the assignee for the purposes of the bankruptcy, and would have to be reconveyed in case there was a surplus. *Long* v. *Rankin* (4) is treated by Lord *St. Leonards* as having been decided on the special circumstances of the case; and he expressly reserves cases of complete alienation when he says (5): "An absolute conveyance upon a sale would, it is apprehended, prevent the power from being exercised from the very nature of the power, independently of any technical question, for powers of sale and exchange are manifestly given to the tenant for life in consequence of the character which he fills . . . . If, therefore, he sells his life estate, it would be contrary to the intent of the donor that he should alter the nature of the property by a sale."

This passage is retained by Lord *St. Leonards* in all the editions of his work, notwithstanding the recent cases. *Long* v. *Rankin* has not generally been understood by conveyancers and text-writers as extending to a complete alienation: *Burton's* Compendium (6); *Hayes* on Conveyancing (7); *Chance* on Powers (8); *Saunders* on Uses (9).

(1) Law Rep. 4 Ch. 230.
(2) 4 Bing. N. C. 726.
(3) Law Rep. 5 Ch. 193.
(4) Sug. on Powers, 8th Ed. pp. 63, 895.
(5) Page 70.
(6) 7th Ed. p. 54, n.
(7) 5th Ed. vol. ii. p. 217.
(8) § 3163, 199.
(9) 5th Ed. vol. i. p. 180.

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Secondly, we contend that the transaction was a fraud on the power. There is quite enough in the deeds to put the purchaser on inquiry, and he is entitled to be satisfied as to the *bona fides* of the transaction. The power was given for the purpose of reinvestment, but it was used simply to perfect the sale by the tenant for life to the assignee. When the tenant for life sold the life estate, he put it out of the power of the trustees to exercise their discretion; for, if a good opportunity for sale and reinvestment occurred, they could not take advantage of it, because of the assignee's veto. The transaction amounted to a sale to the tenant for life, which the Court will not encourage: *Grover* v. *Hugell* (1); *Cowgill* v. *Lord Oxmantown* (2). At all events, the title is too doubtful to be forced upon a purchaser. It involves a point of great nicety, never before expressly decided.

Mr. *Jessel*, in reply.

Dec. 21. SIR W. M. JAMES, L.J., delivered the judgment of the Court, as follows:—

This is an appeal from the decision of the Master of the Rolls. The suit is a suit for specific performance of a contract for sale.

The vendor was himself the purchaser of the estate, which had been the subject of a marriage settlement, whereby the property had been limited for legal estates to *W. H. Hicks*, as tenant for life, with the usual limitations to trustees to preserve the contingent remainders, and to the issue of the tenant for life in tail, with the ultimate remainder in fee to the tenant for life. There were in the settlement powers of jointuring and charging, and the usual powers authorizing the trustees, during the life of the said *W. H. Hicks*, at and by his request and direction in writing, to dispose of the property, either by way of sale or exchange, for such price as to the trustees, their heirs or assigns, should seem reasonable.

By certain assurances the whole of the estate and interest of the tenant for life, including his ultimate remainder, became vested in the Plaintiff, the tenant for life having made an absolute and un-

(1) 3 Russ. 428. (2) 3 Y. & C. Ex. 369.

conditional alienation thereof. The words of the operative part of the deed are as follows:—[His Lordship read the clause in the indenture of the 29th of October, 1862, set forth above.]

Four years afterwards, viz., in August, 1866, new trustees were appointed, and by an indenture dated the 27th of March, 1868, the new trustees, at the request and by the direction of *Hicks*, conveyed the property absolutely to the Plaintiff, the consideration-money being £19,000. The Plaintiff afterwards, on the 13th of May, 1869, sold the same by auction in several lots to the Defendant, at prices amounting in the aggregate to £21,000.

On the investigation of title, the purchaser objected that, by reason of the absolute alienation of *Hicks's* future estate and interest, his power to direct and request the sale was gone, and therefore the trustees had no power to make the conveyance to the Plaintiff; and it was a further question, whether the power was not executed rather for the purpose of completing the present vendor's pre-existent arrangement with the tenant for life than in the actual exercise of the trustees' discretion.

As to the first objection, the Plaintiff insisted that the objection in law was not well founded; and to the second, that there was nothing shewn to throw any suspicion on the *bona fides* of the sale made by the trustees, or to suggest a doubt as to its having been made in a fair exercise of their discretion.

The purchaser still persisting, the bill was filed for specific performance of the contract.

The Master of the Rolls was of opinion that the objection to the title, on the ground of the alienation of the tenant for life's interest, was good.

He disposes first of an objection which has been pressed upon us, as follows: "I do not adopt the expression frequently cited to me, that the Court will abstain from compelling a Defendant to accept a title where, though the point is doubtful, the Court is of opinion that the objection is bad." We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court would not, on its own view, compel a purchaser to take a title; still, as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what

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the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument.

This case involves a question of general law applicable to all similar settlements, and we are bound to say one way or the other what that law is, and we cannot in such a case escape from that duty by saying that the decision of the Master of the Rolls, in taking one view, makes the other view, if held by us, so doubtful that we cannot force it on a purchaser. The contrary was expressly laid down by our predecessors in the case of *Beioley* v. *Carter* (1), adopting the language of Lord *St. Leonards* in the case of *Shepherd* v. *Doolan* (2) there cited.

We may also dispose of the suggestion that there was something in the case to arouse suspicion and to put the purchaser on inquiry, and to entitle him to require explanation and evidence as to the *bona fides* of the sale by the trustees. We see nothing to excite such suspicion or to raise such doubt; and if we were to lay down that the purchaser in this case was entitled, merely on the fact that the sale was made to the purchaser of the life interest by recently appointed trustees, and that on a sale by auction eighteen months afterwards a profit of £2000 on £19,000 was made, to suggest doubts and suspicions of *mala fides*, and to insist on their being removed, we should be throwing, probably, on every purchaser under similar circumstances the duty of being in like manner doubtful and suspicious, and throwing doubt on the title of every such purchaser who has not been so suspicious.

We come, therefore, to the consideration of the real question, whether the absolute alienation of the tenant for life's life and other interest, has destroyed the power of sale in the trustees. The grounds of the Master of the Rolls' decision will be found summed up in the following passage: "Here the settlor settles an estate on *A.* for life, with remainder to his issue, and in default of such issue to *A.* in fee; and he gives *A.* a power of sale. I call it a power of sale to him, though it is, in fact, a power of sale to the

(1) Law Rep. 4 Ch. 230. (2) 3 D. & War. 1, 8.

trustees, to be exercised at his request and by his direction in writing; for that does not for the present purpose differ from a power of sale given to him alone. *A.* sells all his interest. Surely the intention of the settlor was that the power of sale should thereupon become incapable of being exercised, for he could never have meant that the tenant for life, when he had become a mere stranger, without any interest in the property, should be able so to sell it as to deprive his issue of the full value of the estate."

If the case were unaffected by authority, we should, on principle, have great difficulty in concurring in this reasoning. It appears to us that it is rather legislating than expounding—rather introducing into the settlement a provision which is not there than construing the provisions which are there. The words of the settlement are very plain and unambiguous—"at and by the request and direction of the said *H. W. Hicks*;" and if it had been intended to add to it the qualification, "so long as he shall retain his life estate," it would have been very easy to say so. There is no doubt that, in fact, such a qualification does, to some extent, *ex post facto* exist; that is to say, that, having parted with his life estate, he is precluded from doing anything to derogate from his own grant; but that is a matter entirely between him and his alienee, and does not in any way shew that it is a qualification which the donor of the power originally annexed to it. We do not see what necessary or reasonably plain implication there is that the tenant for life, by his own act in aliening the property, was thereby absolutely to deprive the remaindermen of the benefit they were intended to get through the honest exercise of the trustees' power and discretion, or through the honest exercise of their parent's or ancestor's discretion. We are unable to see that it was "surely the intention of the settlor that the power of sale should thereupon become incapable of being exercised." In this case the settlor was himself the tenant for life. But, take the ordinary case of another settlor, or a testator: we think it quite as likely, if he were asked what is to be done in case the tenant for life sells the property, he would say, "Well, he is still the proper person to promote and guard his children's interest;" or he would say, "In that case the trustees must do it of their own authority." The supposed temptation to undue influence is nothing like so great as in the case of a sale to

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the tenant for life himself, which, it is clearly established, may lawfully be done under such a power; and a tenant for life incumbering his life estate, probably paying heavy interest to his mortgagee, and a heavy premium on the life policy which a tenant for life borrower has ordinarily to effect, is much more likely to be under the pressure and temptation arising from the *res angusta domi* than a man who manfully meets financial difficulties by getting rid of the expensive luxury of landed estates, and betakes himself to some new sphere and occupation. But the case appears to us to be really settled by a current of authorities. The case of *Long* v. *Rankin* (1), in the House of Lords in the year 1822, turned on a leasing power given to a tenant for life who had aliened his life estate by way of security, such alienation being so made as to make the exercise of the leasing power no derogation of the grant. In that case Lord *Tenterden*, speaking for himself and the Judges, advised the House of Lords as follows:—

[His Lordship then read passages from the report of *Long* v. *Rankin*, commencing with the words, "The only question is, whether the lease, upon the death of *Robert Crawford*, became void as against the remainderman;" and continued:—]

That was a very elaborate and very authoritative expression of opinion, and the reasoning and principle of the judgment appear to us in every word applicable to the present case. Indeed, it appears to us much more easy to imply that a leasing power in the tenant for life himself is annexed to the estate than such a power as the present, which only extends to putting the trustees into motion if they shall be so minded. The case of *Warburton* v. *Farn* (2) was a case of settlement like this, with a similar power of sale—an absolute alienation of the life estate—a subsequent conveyance with the consent of the tenant for life by a sale afterwards by the purchaser, the same objection taken, and a suit for specific performance, and a decree establishing the title. The only distinction between that case and the present is, that there, in the alienation of the life estate, the power was expressly reserved, and it was held that thereby the assent of the purchaser was made unnecessary, as there was no derogation from his grant.

But how could that in any way affect the original construction

(1) Sug. on Powers, 8th Ed. p. 899. (2) 16 Sim. 625.

of the power? If to the power was by implication annexed a condition determining it in the event of alienation, how could the donee of the power alter that by merely himself saying that his alienation should not have that effect?

Then, in *Holdsworth* v. *Goose* (1), there was a power almost identical with the one in the present case, and there the Master of the Rolls himself decided, and we think rightly, that the power was not extinguished by the bankruptcy of the tenant for life, but that a good title might be made with the assent of himself and his assignees. Bankruptcy is the most complete alienation that could be made of all the bankrupt's estate and interest. We are unable to distinguish between a transfer effected compulsorily by bankruptcy and a transfer effected by a voluntary disposition of the property; and indeed the grounds of the Master of the Rolls' judgment in the case under review would seem to apply with tenfold force to a bankrupt who may be presumed to be insolvent rather than a tenant for life selling, and who may quite probably have sold, in order to be in more comfortable and affluent circumstances.

Eisdale v. *Hammersly* (2), also before the Master of the Rolls, was likewise the case of a bankruptcy; but there it went a step farther, for the assignees sold the life interest, and it was held that, with the consent of the persons in whom such life interest had under such sale vested, a good title could be made. We are unable to suggest any principle on which to make a distinction between such an alienation and an alienation by the mere act of the tenant for life himself. The only thing really pressed on us against these decisions is that Lord *St. Leonards*, in successive editions of his work on Powers, has treated each case as limited to the circumstances of that case, and has declined to recognise them as establishing the broad principle that, so long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power. We cannot set this limitation on the part of this eminent author against the judicial decisions themselves.

On authority and principle, therefore, we prefer these earlier decisions of the Master of the Rolls to the one under review. We hold them to be quite right, and to be undistinguishable in prin-

(1) 29 Beav. 111. (2) 31 Beav. 255.

L. JJ. 1870 ALEXANDER v. MILLS.

ciple, and are therefore of opinion that his order should be discharged, and that we should substitute for it a declaration to the effect that the Defendant's objections to the title mentioned in the bill are not well founded.

Solicitors for the Plaintiff: Messrs. *Wood, Street, & Hayter,* agents for Messrs. *Keary, Stokes, & Goldney, Chippenham.*

Solicitors for the Defendant: Messrs. *Thomas & Hollams.*

L. J. J. 1870 *Dec.* 22.

PANKHURST *v.* HOWELL.

Legacy—Ademption—Satisfaction.

A testator, by will dated the 17th of December, 1862, gave to his wife a legacy of £200, to be paid within ten days after his decease. On the 28th of November, 1867, during his last illness, he, at the request of his wife, who did not know the contents of his will, gave her £200, that she might have a sum of money which she could control immediately on his death, without the interference of the executors. He died on the 8th of December, 1867:—

Held (affirming the decision of the Master of the Rolls), that the legacy was not adeemed or satisfied by the gift of the £200, for that the providing the wife with ready money immediately after the testator's decease was not such a particular purpose as to bring the case within the rule that, where a testator gives a legacy for a particular purpose, and afterwards accomplishes that purpose himself, the legacy is satisfied.

THIS was a motion by way of appeal from a decision of the Master of the Rolls on a summons adjourned into Court.

Charles Howell, by will dated the 17th of December, 1862, bequeathed all his wearing apparel, jewels, trinkets, personal ornaments, wines, liquors, consumable stores, musical instruments, books of music, and other books, to his wife absolutely, and also gave to her a legacy of £200, which he directed to be paid to her within ten days after his decease. After other bequests, the testator gave the residue in trust for a charity.

On the 28th of November, 1867, the testator drew a cheque for £200 on his bankers, and gave it to his wife. She had it cashed on the same day, and gave the money to a friend to keep for her. The testator died on the 8th of December, 1867.

The widow, by her affidavit, stated as follows:—"I knew my husband had made his will, but did not know what provision he had made for me therein. We often talked on the subject, but he never would tell me. I thought it probable that the Defendant, *C. W. Howell*" (the son of the testator by a former marriage) "would be one of the executors; and having experienced considerable ill-feeling from him, I was desirous that the testator should give me a sum of money which I could control immediately on his death, without interference on the part of his executors; and it was to meet my wishes in this respect that my husband gave me the cheque for £200."

A decree having been made for the administration of the testator's estate at the suit of his daughter, as one of his legatees and next of kin, the widow took out a summons to have the legacy of £200 paid to her, which was resisted on the ground that it had been satisfied by the cheque. The Master of the Rolls ordered payment of the legacy. The trustees of the residuary estate moved by way of appeal from this order.

Mr. *Southgate*, Q.C., and Mr. *Kingdon*, for the Appellants:—

The legacy was given to meet expenses immediate on the testator's death. The cheque was given for the same purpose. Now, where a legacy is given for a particular purpose, a gift *inter vivos* for the same purpose satisfies it: *Debeze* v. *Mann* (1); *Monck* v. *Monck* (2); *Powys* v. *Mansfield* (3); *Roper* on Legacies (4); *Tudor's* Leading Cases (5).

Mr. *Jessel*, Q.C., and Mr. *Waller*, *contrà*, were not called upon.

SIR W. M. JAMES, L.J.:—

The rule on this subject, as stated by Mr. Justice *Williams* (6), is, that where the testator stands neither in the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose,

(1) 2 Bro. C. C. 519.
(2) 1 Ball. & B. 298, 303.
(3) 3 My. & Cr. 359, 377.
(4) 4th Ed. vol. i. p. 381.
(5) 3rd Ed. vol. ii. p. 366.
(6) Wm. Exors. 6th Ed. p. 1240.

L. J. J. 1870 PANKHURST v. HOWELL.

and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to ademption. I think this refers to a legacy given for a particular specific purpose, as for instance a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him. Here the legacy does not appear to me to have been given for a particular purpose within the meaning of the rule.

Solicitors for the Appellants: Messrs. *Palmer, Palmer, & Bull.*
Solicitors for the Defendant: Messrs. *Evans & Co.*

L JJ. 1870 Dec. 16, 21.

DENNY *v.* HANCOCK. (No. 2.)

Practice—Costs of Successful Appeal.

The old established rule, that the Court of Appeal will not give the costs of the appeal to a successful Appellant, except under special circumstances, is still in force. If the Court does not specially give the costs, the Appellant is not entitled to them.

THIS was a motion by the Defendant in the suit to vary the minutes of decree made by the Lords Justices on the 10th of November last (1). The Lords Justices reversed the decision of the Vice-Chancellor *Malins*, and dismissed the bill with costs, but no mention was made by the Court of the costs of the appeal. Accordingly the Registrar, in drawing up the minutes of decree, inserted nothing about the costs of the appeal; and the Defendant now asked that the minutes might be varied by giving him the costs of the appeal.

Mr. *Fooks*, Q.C., and Mr. *Locock Webb*, for the motion, contended that, although in former times it was not considered right to give a successful Appellant the costs of the appeal, on the ground that the unsuccessful party ought not to suffer from the mistake of the Court, yet that rule had been altered in late years; and the

(1) Law Rep. 6 Ch. 1.

practice was now, except in special cases, to give the costs to the successful party, whether he was Appellant or Respondent. Consequently, if nothing was said by the Court about the costs, the successful party was entitled to them as of course. This had long been the practice of the Judicial Committee of the Privy Council. They referred to the following cases: *Martin* v. *Pycroft* (1); *Davis* v. *Griffiths* (2); *Langford* v. *May* (3); *Powell* v. *Lovegrove* (4); *Collins* v. *Burton* (5); *Ralli* v. *Universal Marine Insurance Company* (6); *Baring* v. *Harris* (7); *Phillips* v. *Hudson* (8); *Webster* v. *Cook* (9); *Lillie* v. *Legh* (10).

Mr. *Cole*, Q.C., and Mr. *Macnaghten*, for the Plaintiff, were not called on.

SIR W. M. JAMES, L.J. :—

In this case Mr. *Fooks* has satisfied us that, for a considerable time, and during a long course of practice in this Court, there has been a great innovation admitted upon what was considered to be the old established rule, that the costs of a successful appeal were not given, unless under very special circumstances. To what extent that innovation has gone it is not necessary for us now to consider. But it does not appear that that practice, which prevailed during the time of some of our predecessors, has prevailed to the same extent since. Certainly, when I was sitting here alone I acted, and since the Lord Justice and myself have been sitting together we have acted, upon the notion that the general rule was, that the Appellant did not get his costs; and if that rule is to be considered as altered substantially by the decisions to which our attention has been called, I think that ought to be done by a General Order of the Court, or at all events by an understanding between the Lords Justices and the Lord Chancellor, so that there may be one uniform rule prevailing in both divisions of the Appellate Court. We shall take an opportunity of speaking to the Lord Chancellor before we lay down what the general rule is to be, to know whether his under-

(1) 2 D. M. & G. 785.
(2) 1 W. R. 499.
(3) 22 L. J. (Ch.) 978.
(4) 8 D. M. & G. 357.
(5) 4 De G. & J. 612.
(6) 2 J. & H. 159, 176.
(7) 13 W. R. 210.
(8) Law Rep. 2 Ch. 243.
(9) Ibid. 542.
(10) 3 De G. & J. 204.

L. JJ. 1870 DENNY v. HANCOCK. (No. 2.)

standing is that there has been any such general innovation on the old rule as to make the granting of the costs the rule and not the exception. It is quite clear that, if it is not the rule, the costs would only be given if they were specially mentioned. In this particular case I am happy to relieve Mr. *Fooks* from the personal responsibility which he fancies he has incurred by not asking for the costs, because, if he had asked for the costs of the appeal we should not have given them. [His Lordship then shortly referred to the facts of the case, and continued:—] Under these circumstances we should have thought the case was fully met by making the order as it stands, and not giving the costs of the appeal; and in doing so, of course the costs of this application to vary the minutes will have to be paid by the Appellant.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Dec. 21. On this day the Lord Justice *James* again referred to the case, and said that he had consulted the Lord Chancellor, and that His Lordship had stated that he did not consider that any alteration had been made in the practice of the Court of Appeal as to costs; and that he had never given the costs of appeal to a successful Appellant, although he considered that he had full power to do so, if the circumstances of the case required it.

Solicitors: Mr. *F. W. Denny;* Mr. *Devonshire.*

MOUNSEY *v.* EARL OF LONSDALE.
ATTORNEY-GENERAL *v.* EARL OF LONSDALE.

L. JJ.
1870
Dec. 16.

Practice—Costs—Motion to stand till the Hearing—Costs in the Cause—Amendment of Bill—Information.

In a suit to restrain the erection of a jetty in a river, a motion for an injunction was ordered to stand over till the hearing, but no declaration was made as to costs. The Plaintiff then amended the bill, and turned it into an information and bill. When the suit came to a hearing, a decree was made for a perpetual injunction, and the Defendant was ordered to pay the costs of the suit; but the costs of the motion were not mentioned in the decree:—

Held (affirming the decision of *Malins*, V.C.), that the motion was substantially a successful motion, and that the costs of the motion were costs in the cause:

Held, also, that the amendment of the bill, by which it was turned into an information and bill, did not affect the question.

THIS was an appeal from a decision of Vice-Chancellor *Malins*. The case is reported (1).

In October, 1864, the Plaintiff, Mr. *Mounsey*, filed the original bill in this suit to restrain the Earl of *Lonsdale* from continuing or completing the construction of a jetty in the bed of the river *Eden*, so as to injure the Plaintiff's land. In the same month a motion was made for an *interim* injunction, and was ordered to stand over till the hearing of the cause; but the order gave no direction as to the costs of the motion.

In January, 1865, the bill was amended and turned into an information and bill, and, as amended, prayed for an injunction to restrain the Defendant from continuing or completing the construction of the jetty, so as to injure the Plaintiff's land, or so as to interfere with the free use and navigation of the river as a public navigable stream.

Upon the hearing of the cause in December, 1868, as reported (2), a decree was made for a perpetual injunction in terms of the prayer of the information and bill, and the Defendant was ordered to pay the costs of the suit. The affidavits filed in sup-

(1) Law Rep. 10 Eq. 557. (2) Law Rep. 7 Eq. 377.

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port of and in opposition to the motion were read and used at the hearing, but the decree was silent as to the costs of the motion.

The Taxing Master, in taxing the Plaintiff's costs of the suit, disallowed the costs of the motion, including the costs of the affidavits.

The Plaintiff having taken out a summons to vary the taxation as to the disallowance of the costs of the motion, the summons was adjourned into Court, and the Vice-Chancellor declared that the costs of the motion ought to have been included; and from this decision the Defendant appealed.

Mr. *Wickens*, and Mr. *Davey*, for the Defendant:—

We admit that the affidavits having been used at the hearing, the costs of filing them are properly included in the costs of the cause. But this does not apply to the other costs of the motion. Sir *J. Leach's* rule (1) is well established, that if a party has made a successful motion, and no order is made as to costs, and he succeeds at the hearing, he is entitled to the costs of his successful motion. But this was not a successful motion. No order was made on it, but it was simply ordered to stand till the hearing. At the hearing of the cause the Plaintiff ought to have asked for the costs of the motion, and the Court would then have heard argument on the question whether they ought to be allowed: *Markwick* v. *Pawson* (2); *Gardner* v. *Marshall* (3); *Morgan* and *Davey* on Costs (4), and the cases there cited. As he omitted to do this, his proper course would be to make a special application, under the liberty to apply, not to take out a summons to vary the certificate: *Viney* v. *Chaplin* (5); *Harris* v. *Hilliard* (6). But there is this further difficulty in the present case, that the motion was made in the suit before the bill was amended; and by amending the bill, and turning it into an information, the Plaintiff abandoned the motion. When the suit came to a hearing it was not the same suit as when the motion was made, and the costs of the suit could not therefore include the costs of the motion.

(1) Mem. 1 S. & S. 357.
(2) 33 L. J. (Ch.) 703.
(3) 14 Sim. 575.
(4) Pages 33, 34.
(5) 3 De G. & J. 282.
(6) 20 L. T. (N.S.) 216.

Mr. *Glasse*, Q.C., and Mr. *Mounsey*, for the Plaintiff, were not called on.

SIR W. M. JAMES, L.J.:—

This case reminds me of what I was informed, forty years ago, by the late Mr. *Jacob*, that questions in this Court are in the following order, with respect to the importance attached to them and the zeal with which they are argued, namely, practice first, costs second, and merits third and last. For there has been a great deal of zeal exhibited in arguing this question, which is a mere technicality and a question of costs.

I am of opinion that the Vice-Chancellor's judgment is substantially correct, and not formally incorrect. There was a suit instituted by a gentleman who complained of a nuisance, and he asked for an injunction to restrain that nuisance. The motion was ordered to stand over to the hearing. On the hearing of that suit the motion must have been, and was, also before the Court in substance and effect; because the meaning of ordering a motion to stand over to the hearing is that the application for an injunction may be more fully and deliberately considered at the hearing than on the motion, and that there is no sufficient pressure to prevent that fuller consideration being given to it. When the matter came before the Court, it was held that the Plaintiff was entitled to the injunction, which was the subject of the motion as well as of the suit; and the Court gave him in substance, and apparently also in form, as far as the Plaintiff was concerned, that very thing that was asked for by the motion. I am of opinion, therefore, that the Vice-Chancellor was not wrong in saying that this was, in substance and effect, a successful motion. I quite admit that it is desirable, where a motion is ordered to stand over, in order to prevent the Taxing Master from having any difficult question to determine, that the motion should be mentioned in the decree. But, in truth, the question before us relates to a very small part of the order of the Vice-Chancellor that is complained of, because, so far as the affidavits used on the motion are concerned, they were also used at the hearing of the cause, and, as I understand, were inserted as read in the decree. Therefore the Taxing Master ought, without any doubt, to have allowed the costs of all those affidavits as

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material in the cause. Consequently this appeal relates chiefly to the briefs and fees of counsel on the motion.

But it was said that the motion had ceased to exist, and the Court could not deal with it because of the amendment converting the bill into an information and a bill. I am of opinion that, in adding the name of the Attorney-General, so as to make that which was a bill of a Plaintiff an information of the Attorney-General as well as a bill, the bill of the original Plaintiff still remains on the record of the Court; and that the suit which was brought to a hearing was the same suit, as far as the Plaintiff is concerned, which was in existence at the time the application was made to the Vice-Chancellor. Otherwise the effect would have been that, if the bill had been ultimately dismissed, the Defendant would have been deprived, from the time when the Plaintiff amended his bill, of all the costs previously incurred. If the suit does not exist for the purpose of giving costs to the Plaintiff, the same thing must apply to the costs of the Defendant. Therefore I am of opinion that that objection has failed.

If there had been any ground for the present appeal it would have turned upon the merest technical point in the world, namely, that there ought to have been a special application to the Court to supply the slip which had been made in omitting to say "Including the costs of the motion." If that had been done, it is obvious to me that, according to *Viney* v. *Chaplin* (1) and *Betts* v. *Clifford* (2), the costs would have been given as a mere matter of course. Indeed, the case of *Viney* v. *Chaplin* appears to me to support the Vice-Chancellor's order; for there the motion was treated as unsuccessful, because the failure of the suit involved the failure of the motion, just as in this case the success of the suit involves the success of the motion. I am of opinion, therefore, that the Vice-Chancellor was quite right, and that his order must be affirmed.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiff: Messrs. *Gray, Johnston, & Mounsey.*
Solicitors for the Defendant: Messrs. *Ellis & Ellis.*

(1) 3 De G. & J. 282. (2) 1 J. & H. 74.

In re CONTRACT CORPORATION.

L. JJ.
1871
Jan. 13.

Witness in Winding-up—Summons under Companies Act, 1862, *s.* 115.

The *C. Company*, which was being wound up by the Court, was a judgment creditor of the *T. Railway Company*, and the official liquidator sued out an elegit under the judgment. Afterwards the *G.* and *M. Railway Companies* entered into an arrangement with the *T. Company* to run over the *T.* line; but this arrangement brought no profit to the *T. Company* or their creditors. The official liquidator of the *C. Company* then promoted a bill in Parliament to oblige the *G.* and *M. Railway Companies* to take a transfer of the *T. Railway* and pay off its liabilities. To assist in this object he applied for a summons to examine the shareholders of the *T. Company*, for the purpose of proving that they were nominees of the *G.* and *M. Companies.*

The Court allowed the summons to issue, without prejudice to any objections which the witnesses might take.

THIS was an application for leave to issue a summons under sect. 115 of the *Companies Act*, 1862.

The *Contract Corporation, Limited*, was a creditor of the *Tottenham and Hampstead Junction Railway Company* for upwards of £35,000 in respect of a judgment debt. The official liquidator of the company had sued out an elegit upon the judgment, and obtained formal possession of the line, but with no practical result. The *Great Eastern Railway Company* and the *Midland Railway Company* subsequently entered into an arrangement with the *Tottenham and Hampstead Junction Company*, under which they worked the *Tottenham and Hampstead Junction* line, and a considerable traffic passed over it; but this traffic, although very important to the *Great Eastern* and *Midland Railway Companies*, brought no profit to the *Tottenham and Hampstead Junction Railway Company*, or their creditors.

The *Great Eastern* and *Midland Railway Companies* held shares to the amount of £103,300 in the *Tottenham and Hampstead Junction Company* out of £270,000 subscribed capital; and the official liquidator of the *Contract Corporation* was desirous of proving that the other shareholders were nominees, or under the influence of the same two companies, hoping that the establish-

L. JJ. 1871 *In re* CONTRACT CORPORATION.

ment of this fact would enable him to carry a bill in Parliament, which had been brought in with the consent of the Master of the Rolls, to oblige the two companies to take a transfer of the *Tottenham and Hampstead Junction Railway*, and pay off its liabilities.

For this purpose he applied, in the Chambers of the Master of the Rolls, for a summons under the 115th section of the *Companies Act*, 1862, to examine the shareholders of the *Tottenham and Hampstead Junction Railway Company*. The application was adjourned into Court, when His Lordship expressed an opinion adverse to the application, but suggested that the matter should be brought before the Lords Justices, as in the case of *In re Smith, Knight, & Co.* (1).

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator, accordingly renewed the application, which was made *ex parte* before the Lords Justices. They relied on the case referred to in the Court below.

THE LORDS JUSTICES were of opinion that the summons might properly issue, but without prejudice to any objection which the witnesses might take when they attended for examination.

Solicitors: Messrs. *Linklaters, Hackwood, Addison, & Brown.*

(1) Law Rep. 4 Ch. 421.

CLEMOW *v.* GEACH.

L. C.
1870
Nov. 3.

Estoppel—Term at Law—Jurisdiction.

A settlor, by deed, purported to grant an annuity out of certain land, and to grant a term of 100 years to a trustee to secure the annuity. At that time the settlor had not the legal estate, which was outstanding in mortgagees. The settlor died, devising to his three sons, who paid off the mortgage, and the mortgagees conveyed the estate to the uses of the will. The devisees then sold to a purchaser without notice of the annuity. The annuitant filed a bill against the trustee of the term and the purchaser to recover the annuity:—

Held, that the annuitant had no remedy in equity against the purchaser, but might compel the trustee to proceed at law and establish his title, if any, against the purchaser.

Semble, the devisees would not be estopped from denying the grant of the term.

By indentures of lease and release by way of mortgage, the release bearing date the 19th of November, 1814, *James Clemow* conveyed certain lands in *Cornwall*, called *Bejowan* and *Hobbs Meadow*, to *John Tom*, his heirs and assigns, subject to redemption on payment of £500 and interest, upon a day long past. The land and money became vested in *D. Tom*, *T. Treloar*, and *C. P. Tom*; and by an indenture of further charge, bearing date the 25th of January, 1839, *J. Clemow* further charged the land with repayment of £300 to *D. Tom*, *T. Treloar*, and *C. P. Tom*.

By an indenture made on the 23rd of November, 1839, between *James Clemow* of the first part, *Francis Clemow*, his son, of the second part, *Betsy Rowe* (afterwards *Betsy Clemow*) of the third part, and *W. J. Geach* of the fourth part: after reciting that a marriage was intended between *Francis Clemow* and *Betsy Clemow*, and upon the treaty for the same, and in consideration of the fortune which *Francis Clemow* would on such marriage receive, and for divers other good considerations him the said *J. Clemow* thereunto moving, he, the said *James Clemow*, did for himself, his heirs, executors, and administrators, give, grant, confirm, and limit unto *Betsy Clemow*, in case the said marriage should take effect, and she should survive *Francis Clemow*, one annuity of £12 10*s*., to be issuing and received by and out of the lands called *Bejowan* and *Hobbs Meadow*, to hold the said annuity unto the

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said *Betsy Clemow* and her assigns, from the death of the said *Francis Clemow*, for the time of her life, and in bar of dower. And it was thereby declared, that if the said annuity should at any time be unpaid for twenty days, then it should be lawful for the said *Betsy Clemow* and her assigns to enter into the said lands and distrain thereon until the said annuity should be satisfied. And it was further declared, that in case the said annuity should be in arrear for forty days, then it should be lawful for *Betsy Clemow* and her assigns to enter into and upon the said lands, and to receive the rents thereof until she should be paid and satisfied the said annuity. And it was further witnessed, that for the considerations aforesaid, and in consideration of the sum of 10*s.* to *James Clemow* paid by *W. J. Geach*, he, the said *James Clemow*, did demise unto *W. J. Geach* and his executors, administrators, and assigns, all those the before-mentioned lands called *Bejowan* and *Hobbs Meadow*, to hold the same unto *W. J. Geach*, his executors, administrators, and assigns, for the term of 100 years, to commence from the death of *Francis Clemow*, upon trust that, in case the said annuity should at any time be in arrear for forty-one days, then it should be lawful for *W. J. Geach*, his executors, administrators, and assigns, by and out of the said lands, and the rents and profits thereof, or by demising, leasing, mortgaging, or selling the same for all or any part of the said term of 100 years, to raise such sums as should be in arrear, and to pay the surplus to the person or persons who might be entitled in reversion or remainder to the freehold and inheritance expectant on the determination of the said term of 100 years: Provided always, that at full payment of the annuity the said term should cease.

By indentures made in 1845 and 1851, *James Clemow* further charged the lands comprised in the above-mentioned indenture of mortgage with the repayment of £400 and £500, and interest.

James Clemow died in 1853, having, by his will, devised part of these lands to his wife, *Ann Clemow*, and having bequeathed the residue of his estate to his three sons, *William Clemow*, *Francis Clemow*, and *Robert Clemow*, their heirs and assigns, as tenants in common, and having appointed his sons his executors.

By an order of the Court of Chancery the land and the mortgage-money became vested in *C. P. Tom*, *W. Shilson*, and *T. Coode*;

and they, by an indenture bearing date the 30th day of August, 1854, in consideration of £1500 to them paid by *F. Clemow*, *W. Clemow*, and *R. Clemow*, granted the lands comprised in the said indenture of mortgage to *Henry Whitford* and his heirs, freed and discharged from the said sums of £500, £300, £400, and £300, to such and the like uses and trusts as were in and by the will of *James Clemow* expressed, concerning the real estate thereby devised.

By an indenture bearing date the 16th of September, 1854, and made between *F. Clemow*, *W. Clemow*, and *R. Clemow* of the one part, and *J. Tremain* of the other part, in consideration of £2800, the said *F. Clemow*, *W. Clemow*, and *R. Clemow* granted the lands called *Bejowan* and *Hobbs Meadow* (except the piece devised to *Ann Clemow*) unto and to the use of *J. Tremain* and his heirs and assigns. *J. Tremain* had, at the time of the purchase, no notice of the settlement of 1839. The lands comprised in his purchase were more than three-fourths of those comprised in the settlement.

Francis Clemow died in 1860, and the widow, *Betsy Clemow*, and the trustee of the term, *Geach*, applied to *J. Tremain*, and also to the purchaser of the piece devised to *Ann Clemow*, for payment of the annuity; and on the 15th of September, 1868, *Betsy Clemow* filed the bill in this suit against *Geach* and *Tremain*, stating as above stated, and alleging that she had applied to *Geach*, who asserted that, by reason of the lands devised being in possession of the purchaser, he was unable to raise the annuity; and praying that the trusts of the term of 100 years might be carried into execution, and that the arrears of the annuity might be raised and paid.

The Vice-Chancellor *James* dismissed the bill, holding that the equity of redemption in *James Clemow* was not such an estate as enabled him to grant a term, and that the devisees under the will, and the purchaser who took under them, were not estopped from denying the grant of the term.

The Plaintiff appealed.

Mr. *Langworthy*, for the Plaintiff, contended that, though the settlor had not the legal estate when he professed to create the term, yet his devisees were bound by estoppel, and could not deny

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the existence of the term: *Webb* v. *Austin* (1); *Doe* v. *Thompson* (2); *Trevivan* v. *Lawrence* (3). The Plaintiff had a right to come to this Court and recover the annuity: *Snow* v. *Booth* (4).

Mr. *Davenport*, for *Geach*.

Mr. *Fry*, Q.C., and Mr. *Rowcliffe*, for *Tremain*:—

The Plaintiff has no rights here, except to compel *Geach* to proceed at law. This is in effect merely an ejectment bill. The question is purely legal, and if this suit could be maintained, then every legal question, where there happened to be a *cestui que trust*, could be brought before this Court. As to the legal question, *Clemow* had no legal estate when he professed to create the term, and could not create a term or grant an annuity out of the land. Moreover, there is no estoppel, for the devisor never had the legal estate, which was got in by the devisees for themselves from the mortgagees. We are purchasers for valuable consideration without notice, and claim the estate free from the annuity.

Mr. *Langworthy*, in reply:—

We are entitled to have a declaration of trust, and the rest of the relief is incident. The purchaser has covenants for title, and will recover from the vendors. The devisees have had the legal estate conveyed to the trusts of the will, and are estopped from denying the grant and assignment of their devisor.

LORD HATHERLEY, L.C.:—

The question in this case is, in fact, whether the purchaser or *Geach* has the legal estate, for if *Geach* has the legal estate, then the Plaintiff is entitled to call upon *Geach* in a Court of Equity to execute the trusts and obtain payment of the annuity; but she contends further that, she having that right against *Geach*, the Court is bound to decide the question as to the legal estate. The purchaser says that *Geach* has no legal estate at all, that the purchase was without notice of the annuity, and that the Plaintiff has no remedy here. Of course, if *Geach* has the legal estate, the Plaintiff can proceed in equity to compel him to raise her

(1) 7 Man. & G. 701.
(2) 9 Q. B. 1037.
(3) 2 Sm. L. C. 5th Ed. p. 677.
(4) 2 K. & J. 132.

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annuity; but, in my opinion, she has no remedy here against the purchaser without notice, the only question being, whether the estate is subject to the term, which appears to depend upon a question of estoppel.

That question is a pure and dry legal question: *Tremain* claiming the whole estate, and the Plaintiff alleging that *Geach* has a term of 100 years. It has been said that the parties ought not to be driven from Court to Court, and that this Court is competent to decide the whole of the questions involved. No doubt the Legislature might give such jurisdiction, but I cannot assume it, and decide this question here.

I am inclined to think that there is no estoppel; but the whole doctrine of estoppel is of extreme nicety, and I prefer to decide on the ground that the question is legal.

I shall affirm the decision of the Vice-Chancellor, without prejudice to any action at law which the Plaintiff or *Geach* may be advised to bring.

Solicitors for the Plaintiffs: Messrs. *Emmets, Watson, & Emmet.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle.*

CALTHROP *v.* RUMMENS.

L. C. 1871 *Jan.* 13.

Practice—Printing Pleadings—Cons. Ord. ix. *rule* 3.

The paper on which the pleadings in Chancery are printed must be of the quality prescribed by Cons. Ord. IX. rule 3, but need not be weighed in the Office of the Record and Writ Clerks in order to ascertain the quality.

The margin of the printed pleadings should be of the size prescribed; but a pleading with a margin somewhat smaller may by order be filed.

By Cons. Ord. IX. rule 3, bills are to be printed on paper 19 lbs. per mill ream, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide; and by rule 3 of Gen. Ord. of 6th of March, 1860, answers are to be printed in the same way. It was stated that a practice had lately been adopted in the Record and Writ Clerks' Office of weighing bills and answers, and refusing to file them when the individual sheets did not weigh the full proportionate part of the required weight of the ream.

IN this case an answer had been printed on the paper ordinarily used for Chancery pleadings, and known in the trade as of 18 lbs.

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per mill ream (1); but the edges had been trimmed so that the weight of the answer was reduced by a fraction below the proportional part of 18 lbs., which the sheets should have weighed, and the outer margin was reduced to little more than two inches and a quarter.

The Record and Writ Clerks had refused to file the answer so printed, and

Mr. *Whitehorne* now brought the matter before the Lord Chancellor.

THE LORD CHANCELLOR said that the object of the order was to secure the quality of the paper, and that the weight of the particular sheets was immaterial. The eye ought to be a sufficient judge of the quality, and it could not be necessary to weigh each document. As to the size, no doubt uniformity was desirable, in order that the pleadings might be conveniently filed, and, if necessary, bound up; it was, therefore, to be regretted that the proper margin was not rigorously retained. He thought, however, that this particular answer might be received; and made an order accordingly.

Solicitors: Messrs. *Lewis, Munns, & Co.*

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MIDDLETON *v.* CHICHESTER.

Attachment—Defaulting Trustee—Possession or Control—Principal and Interest—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

Where a trustee has made default in payment of a sum of money ordered by the Court to be paid, and admitted to have been in his possession, an attachment may be issued against him, although he may have spent the money before the order and be unable to pay; and such a trustee is within the 3rd exception of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), s. 4.

For the purpose of bringing a trustee within the 3rd exception of sect. 4 it must appear that the money ordered to be paid by him had at some time been actually in his possession or under his control. Hence no attachment can be issued against a trustee on an order directing the payment of a sum

(1) There is no paper made of 19 lbs. per mill ream. The additional pound was added by the Consolidated Order, to allow for the weight of the wrapper.

composed of principal and interest not distinguished, inasmuch as the interest might not at any time have been in his possession or under his control.

Order of *Stuart*, V.C., discharged.

A BILL was in the year 1861 filed by *N. R. Middleton* and others claiming under the will of *John Hopton*, against *J. H. B. Chichester*, executor of the will, for an account and for payment of the value of certain funds, part of the estate of the testator, alleged to have been sold out by the Defendant before the year 1855. The Defendant, by his answers, admitted the sale of certain sums of stock, and that, under the special circumstances stated in his answer, he had applied the proceeds to his own use.

The suit was not brought to a hearing, but certain orders were made in it; and by an order dated the 15th of December, 1864, it was ordered that the Defendant should, on or before the 11th of January, 1865, or subsequently within seven days after service of the order, pay to one of the Plaintiffs £4314 4*s*. cash, being the agreed balance of the proceeds of the sale of £400 Reduced, part of a sum of £8000 Reduced, and of the proceeds of the sale of £1750 and £1250 Consols, parts of £3500 Consols and £2500 Consols, and of the interest on such proceeds from the times of the deaths of certain annuitants; and it was further ordered that the Defendant should pay certain other sums and the costs of the suit; and, except for the purposes of the order, all other proceedings in the suit were stayed.

On the 10th of November, 1869, the Defendant was served with this order, and the £4314 4*s*. not having been paid, the Plaintiffs moved for leave to issue an attachment against the Defendant. The Defendant filed an affidavit, stating that he had not at the time when the order was made or now in his possession or under his control the sums of money, or any of them, mentioned in the order of the 15th of December, 1864, and that he had not at the time when the order was made or now in his possession or under his control any sums or sum of money wherewith to satisfy the said order, and that his income was insufficient for his maintenance, and that he had been obliged to obtain aid from his friends.

The Vice-Chancellor *Stuart*, on the 11th of January, 1871, made an order that the Plaintiffs be at liberty to issue an attachment

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against the Defendant for his contempt in not paying the said sum of £4314 4*s.* pursuant to the above-mentioned order.

The Defendant appealed.

Mr. *Higgins*, for the Defendant:—

The Defendant in this case was entitled to part of the funds which he dealt with, and had also a claim on a foreign Government, by which he expected to obtain money. After the bill was filed, he submitted to this order with a view to save expense and trouble, and with hopes of raising the money. The order has only lately been served on him, and then leave to issue the attachment was applied for. He relies on the 4th section of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), and contends that he is not within the 3rd exception of that section, which is the only exception relating to such a case. He has no money and no means of paying, and therefore does not come within the exception, which clearly is intended to apply to a contumacious trustee only. If he can be shewn to have the money he will be excepted, and may be imprisoned. Suppose he had put the money into a bank which afterwards failed, or had otherwise foolishly, but with the best intention, lost the money, and was unable to repay it; it is clearly the design of the Legislature that he should not in such a case be imprisoned. A meaning must be given to the words "in his possession or under his control." And what can be the meaning, except that he is able to pay, and refuses. The whole intention of the Act is, that persons are not to be imprisoned merely because they are unable to pay: *Hewitson* v. *Sherwin* (1). Imprisonment by this Court is not in the nature of a punishment, but is a means of compelling obedience to its decrees. If the Defendant is liable to punishment for misconduct, he may be brought before a criminal Court. Moreover, the order is bad as committing him for an indefinite term, instead of for twelve months only, which is the limit assigned by sect. 4.

Mr. *Dickinson*, Q.C., and Mr. *C. Barber*, for the Plaintiffs:—

The Act might have been more clearly expressed, but there can be no doubt as to the meaning. It is absurd to say

(1) Law Rep. 10 Eq. 53.

that a man will be committed only when the money can be earmarked and shewn to be in his possession. There is nothing in the Act to confine the exception to cases of contumacy, or to cases where the money is in hand: *In re Rush* (1). The Act makes a clear distinction between ordinary debtors and defaulting trustees. The sum in question must be treated as still in the hands of the Defendant. He has virtually admitted it, and is estopped from denying it. If a Defendant has innocently lost the money, or, if there is any other reason why he should not be committed, he has an opportunity of shewing cause on the motion for attachment.

Mr. *Higgins*, in reply:—

A meaning must be given to the words "in his possession or under his control." Has this money ever been in the possession or under the control of the Defendant? It is for the Plaintiffs to shew that it has, and they have not done so; at all events they have not as to the interest, part of the money.

The LORD JUSTICE MELLISH:—It seems to us that there is a difficulty in this case, because the sum ordered to be paid is stated to be composed of principal and interest, and we cannot say that the interest was ever in his possession or control. He may have made none.

Mr. *Dickinson*:—Whether he actually received the interest or not, does not signify. He has had the use of the money, which comes to the same thing in either case. He has admitted this sum to be due, and it is of no consequence how it has arisen. At all events, he has made default in payment of the principal.

LORD HATHERLEY, L.C.:—

The turn which this case has taken is somewhat unfortunate, because it was brought before the full Court in order to have a construction put upon the statute on the general question.

That question was, whether an order made by this Court on a defaulting trustee, directing the payment of a certain sum of money by a certain day is, or is not, within the 3rd exception of the 4th section of the *Debtors Act*, 1869.

(1) Law Rep. 9 Eq. 147.

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Unless there was some reason for applying the exception, this Defendant, who has been ordered to pay a sum of money, and has made default, would not be liable to arrest or imprisonment for the default he has so made. But if his case be within the 3rd exception, then he would not have the benefit of the 4th section, and would be left to the law as it stood before, with this additional advantage, however, that he would not, under any circumstances, be imprisoned for more than a year.

The argument was, that at the time when that order was made, although it was true that the £4314 4s. had once been in his possession, and that a Court of Equity must regard it as still being in his possession, because he had not properly discharged himself of it, yet, inasmuch as he had spent it, so that he was no longer in a condition to pay, and had so spent it at the time of the order, therefore he was not a person excepted by this 3rd exception, but would be entitled to say, when the order was made, that he was not in possession of that sum of money, nor had it under his control. I apprehend that this construction would ill harmonise with the scope of the whole section and with the various exceptions which have place in it, because the exceptions are all of a character which indicates that the Legislature wished merely to limit the term of imprisonment in regard to certain debts which were not simple debts, contracted in the ordinary intercourse between man and man, where credit is given by one person to another, but were debts the incurring of which was in some degree worthy of being visited with punishment.

Now the first exception is the case of a penalty, and that makes the distinction I have pointed out extremely clear, because, if it is merely a penalty in respect of a contract, that is not to deprive the person who has incurred it of the benefit of the section; but if it is any other sort of penalty, by which is meant a penalty for non-observance of a positive law, then he is to be exempted from the benefit of the section. The 2nd exception is default in payment of any sum recoverable summarily before a justice or justices of the peace. That, again, would be something in the nature of a penalty, and not in the nature of a simple debt.

Then we come to the 3rd exception, default by a trustee ordered by a Court of Equity to pay any sum in his possession;

and then to the 4th, which touches the case of an attorney or solicitor ordered to pay costs for misconduct as such, or in his character of an officer of the Court making the order, which again points to the same sort of distinction, though no doubt there may be particular cases in which the shades of misconduct would vary from the darkest to those of an extremely light description. Then the 5th exception relates to "Default in payment for the benefit of creditors of any portion of a salary or other income, in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order;" and then comes the 6th: "Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made." Therefore, in every case there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference, with reference to the question of delinquency, whether a person has the money in his possession at the time the order is made, or had parted with it some short time before the making of the order. On the contrary, as during the argument I endeavoured to point out, there would be the greatest possible injustice done if the construction which was placed upon this Act should be such as to operate as a species of premium to a person for divesting himself of funds before the making of the order, so as to bring himself within the exception when he was least entitled to such protection.

But there is a sensible and intelligible construction to be put upon the clause, if you read it as pointing to a person who, in respect of his having held trust funds for which he is accountable, is treated by a Court of Equity as having them in his possession until he has properly discharged himself. The consequence would be extremely inconvenient if the Court had to look to anything beyond the order. A common form of order is for the payment into Court of a sum of money on admission by the answer that the Defendant has a sum of money in his hands; but no Defendant ever thought, when setting out in his answer that he had had so much trust money in his hands, that he discharged himself by saying he had spent it.

Of course, if we were to hold that that was the effect of the statute, we should in future see such statements in the answer of every defaulting trustee. The intent of the Legislature was, that

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the Court should simply look to the order, and ascertain that an order had been made for the payment of a sum of money; but if we are to find out whether the Defendant has really possession of the money, what construction can be given to the order? Are we to say that he is in possession of the particular sum in bank notes which can be traced, or that he has possession of a bag of money which can be traced, and if he is not found in possession of the notes or the bag of money he is to be exempted from the operation of the Act? Can you say, if he has spent all the money and has none at his bankers, but has landed estates to the extent of £100,000, that he has not money in his possession, because he has parted with the actual money paid to him? I think that would be too narrow a construction, and that the true construction of the Act is, that when an order for the payment of a sum of money has been made by a Court of Equity of competent jurisdiction on a person as trustee, then that all we have to look at is the fact of that order having been so made, and he must be treated as having in his possession that same fund which he is, in his character of trustee, ordered to pay, inasmuch as he has received it and has never discharged himself of it.

The principal part of Mr. *Higgins*' argument was this: Why are those words added at all? Why does the section say "in his possession, or subject to his control?" Why not say "an order made by a Court of Equity for the payment of a sum of money?" I apprehend very good reasons might be given for that. I think the case of wilful default is one of those pointed at. A Defendant is ordered to pay a sum of money, but it may be a sum which by his wilful neglect or default he never had in possession, and he has never been enriched by it. Then there is nothing of that moral delinquency which is involved in receiving money, and afterwards disposing of it in such a manner that those for whom it was received cannot get the benefit of it; but the case is merely that, by carelessness or otherwise, the Defendant has not duly exerted himself in procuring that money to be paid which should have been paid. That would be a case in which a person would not be deprived of the benefit of the section, but would have the benefit of the section to its fullest extent. So, again, with regard to the word "control." There might be moneys in a man's control which

had never been in his possession—for instance, money in a bank—and the Court might order him to pay.

I now come to that part of this case which creates a great difficulty, and I feel the difficulty to be insuperable. This is an order made by the Court, the balance being admitted by agreement and consent. If it stood there alone, there would be no difficulty; but unfortunately the order on the face of it tells us what is the composition of that balance; that it is composed of two sums, neither of which is given to us, one being principal and the other interest, for which the Defendant is accountable. But the interest has never been in his possession in any sense whatever. It may be that he may have made no interest, or he may have made only 2 per cent. upon it, whilst he has been charged with 4 or 5 per cent. The interest was not a sum which we can say was ever in his possession, therefore we have not an order of a Court of Equity shewing it to be money in his possession, and directing him to pay that money. It is said that the amounts could be ascertained, but I apprehend there would be the greatest possible difficulty in ordering an attachment to issue as to a sum including something which did not come within the exception of the statute. He would be entitled clearly to the benefit of the section as to so much of the sum as was composed of interest, and he would be arrested for non-payment of a sum as to part of which he was entitled to be protected, and as to part of which he was not. Those who want to put the law in force against him must be in a position to produce an order which takes the case out of the operation of the 4th section. It seems to me that such an order is not now produced, and therefore it will be necessary to discharge the order for attachment. Of course there will be no costs.

SIR W. M. JAMES, L.J.:—

I entirely concur. I had my doubts as to what is the proper construction of the Act, but they have been entirely removed.

SIR G. MELLISH, L.J.:—

I quite agree also.

Solicitors: Messrs. *Pilgrim & Phillips;* Messrs. *Smith & Co.*

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BULTEEL *v.* PLUMMER.

Residuary Bequest—Exclusive Appointment—Appointment in pursuance of Covenant.

A testatrix, having power to appoint by will a certain fund amongst all and every of her children and their children, covenanted to appoint a certain sum to one child. She then, by her will, appointed that sum, and appointed other parts of the fund to certain objects of the power, and bequeathed and appointed all the estate over which she had a disposing power to one object of the power. There were other objects of the power:—

Held, that all the appointments were bad, as being exclusive.

Semble, an appointment made by will, in pursuance of a covenant to appoint, would not be invalid.

Quære, whether damages could be recovered for breach of such a covenant.

Decision of *Malins*, V.C., reversed.

By an indenture of settlement made in 1809, a sum of £4000 was vested in trustees, upon trust, after the death of *G. T. Plummer* and *Louisa Plummer*, to transfer the same unto and amongst all and every the son and sons, daughter and daughters, of *G. T. Plummer* and *Louisa Plummer*, and the children of such sons and daughters as should be dead leaving issue, as *G. T. Plummer* and *L. Plummer* should, during their lives, by deed, or as the survivor should by will appoint; and in default of appointment, amongst all and every the son and sons, daughter and daughters, and their issue as above-mentioned, in equal shares. There were five children of *G. T. Plummer* and *Louisa Plummer*, and on the marriage of *Louisa Westmacott*, who was one of them, *Louisa Plummer*, who had survived *G. T. Plummer*, covenanted to appoint to her by will £2500 stock. *Louisa Plummer*, by her will made in 1867, appointed a freehold house (which had been bought with part of the funds in settlement) to her granddaughter *Frances Plummer*; she further appointed £2500 stock, part of the funds of her marriage settlement, in trust for *Louisa Westmacott*, and a further sum of 500 stock to her son *Henry*, and a further sum of £100 stock to her granddaughter *Louisa*; and she appointed and bequeathed all other the estate over which she had a disposing power, and all her real and personal estate, after payment of debts, &c., unto her daughter *Frances Plummer*. She died in November, 1867,

leaving other children and children of children, who, if the residuary bequest operated as an appointment, would take none of the settled funds; and the question was raised, whether the appointments by will were all void, or only the appointment of the residue of the trust fund was void, if it operated as an appointment.

The Vice-Chancellor *Malins* held that the appointments were good, with the exception of the appointment of the residue, as reported (1), where the instruments are more fully stated.

Some of the children, to whom nothing was appointed, appealed.

Mr. *Cotton*, Q.C., and Mr. *Bedwell*, for the Appellants:—

The will is an exclusive exercise of the power; the appointments are all bad, and the fund will go as in default of appointment: *Wilson* v. *Piggott* (2). It is impossible to distinguish the appointment of the residue, and to make that alone bad and the others good: *White* v. *Wilson* (3). In *Young* v. *Lord Waterpark* (4) there were several instruments, which of course made a difference. Suppose that, instead of giving, first, specific sums, and then the residue, she had given the whole in one sum, that would clearly have been bad. Nor can it be held that the covenant was an exercise of the power; it is a personal obligation merely: *Thacker* v. *Key* (5).

Mr. *Cole*, Q.C., and Mr. *Key*, for *Frances Plummer*, to whom the freehold house and the residue were appointed:—

We do not contend that the residuary bequest is good under the power, but the testatrix could appoint the house and the specific sums, and the residuary bequest must be read as saying, "All I have power to dispose of I do dispose of;" for, as she had not power to dispose of the residue of the trust fund to one child, she could not have intended to include it. If she had given the separate sums by will and the residue by a codicil, the gifts of the separate sums would clearly have been good, and yet a will and codicil are one instrument. In *Rowley* v. *Rowley* (6) one corrupt appointment was held not to vitiate the others. We say the appointments of the specific items are good, and that the residue goes as in default of appointment.

(1) Law Rep. 8 Eq. 585.
(2) 2 Ves. 351.
(3) 1 Drew. 298. 17 Jur 15.
(4) 13 Sim. 199, 202.
(5) Law Rep. 8 Eq. 408.
(6) Kay, 242. 18 Jur 367

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Mr. *Pearson*, Q.C., and Mr. *Langley*, for Mrs. *Westmacott*, contended that the specific appointments were good, and only the residuary appointment bad. At all events, the appointment of the £2500 was good, for the covenant was a defective execution of the power, which was made complete by the will. *Thacker* v. *Key* was not a decision on this point. There was no objection to the covenant to appoint, as the only object of the power was that all the children should be provided for: *Coventry* v. *Coventry* (1). In *Reid* v. *Shergold* (2) the only question was as to intention.

LORD HATHERLEY, L.C.:—

We are sorry to be obliged to differ from the Vice-Chancellor in the conclusion at which he has arrived. The statute (11 Geo. 4 and 1 Will. 4, c. 46) requires a share, however small, to be given to each of the objects of the power. I do not pause to inquire into the reason for making that provision. I suppose it was considered that by insisting upon a share, however small, being given to every one, the attention of the donee of the power to all the objects would be secured.

The question is, whether the testatrix has, in fact, given something to every object of the power, or has left anything undisposed of which would answer the purpose of the power equally well by going amongst all the objects in default of appointment. I am bound to say that I cannot come to the conclusion to which the Vice-Chancellor has come upon that subject. I do not think, on reading his judgment, that there is any difference between his views and my own as to what is the effect of the gifts. He does not doubt that this residue means the residue of what she had power to dispose of under the settlement. She has given that residue to one of the objects of the power, and has omitted giving anything to some of those who were among the objects of the power.

The Vice-Chancellor considered that the first gifts would stand good, and that the last gift was invalid; but it seems to me that the gift of residue is as specific as the gift of any other portion of the fund.

I cannot conceive how we are to separate the last gift because it

(1) 2 P. Wms. 222. (2) 10 Ves. 370.

happens to be the last, and how we can say any otherwise than that she has taken the whole fund and has disposed of it; but in so disposing of it she has omitted some objects of the power.

I think the cases that have been cited have really no reference to the matter. It is not a question whether the appointments are made by two separate deeds or by one, but whether any difference can be made between them. If, as in several of the cases referred to by the Vice-Chancellor, an appointment of part has been made, which is perfectly good, and there is left residue enough to give something to all the other objects of the power, then a gift made by deed to others may be perfectly good, and the appointor may go on until he comes to the last, which may be bad. The others are perfectly good, and are not made bad because there is a bad disposition of the rest of the fund. But this is an instrument which at once takes effect as to all the objects; the whole fund is given to the several objects mentioned, one of whom is the last. It appears to me that it would be impossible for us, on any collocation of the persons, to say that because she has last named one particular person, therefore all the other appointments are good; and this one being void, the rest are to stand.

The only point that appeared to me at all arguable, but which nobody seemed particularly desirous to argue, was this: whether it was possible to say that, under the peculiar circumstances of the gift of the £2500 to the married daughter, that gift was void; the effect of which would be to make the other gifts good. But I think it would be a very forced application of the doctrine as to appointments if this were held bad. It is true that there is something like an improper exercise of the power, as, of course, she tries to exonerate her own estate. A question further arises, whether this was a good covenant on which damages could be recovered, as to which I desire to say nothing; but I think that to hold such an appointment bad as a device would be to strain the doctrine as to improper appointments too far. The testatrix did not wish to get any benefit for herself, and I think that she was not prevented from appointing the £2500.

But as we have come to the conclusion that the whole of the appointments are bad, that question does not arise, unless it could be said that Mrs. *Westmacott* stands in a better position by virtue

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of the deed; but this is a specific appointment by will, and she stands like all the rest, a common appointee under the will. All the appointees under the will must take their several shares upon this construction of the will, and after all the shares appointed by the will were handed over, some of the objects would be left out; and, consequently, the whole disposition fails.

It was suggested by the Lord Justice, and has been pressed in argument, that this gift of the residue is not a disposition under the power, because the testatrix could not make such a disposition. But, on consideration, that cannot be sound. The testatrix recites the power and speaks of it, and if the other objects had been well provided for there could have been no doubt, upon the construction of the residuary bequest, that it would include the unappointed residue. The consequence is, that nothing is left to the other children, and all the gifts fail.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. The Vice-Chancellor, referring to *Young* v. *Lord Waterpark* (1), said, that it does not depend upon whether the appointments were by different instruments, but depends upon whether it cannot, by a reasonable construction, be made to amount to the same thing. I am bound to say that it does appear to me to be, not construction, but destruction, to strike out one part of the will, and so arrive at the conclusion that part is bad and part is good. The effect of that may be to frustrate the whole intention; and the question is, whether it will be so absolutely frustrated, or frustrated as to part only, and whether this Court has any jurisdiction to frustrate an intention in part or in whole. It depends upon the will, and upon what is the true construction of the will. The Vice-Chancellor says, in substance, "If I can carry the leading intention into effect, is it not better that I should hold that one part is good, than that the whole is bad?" I do not know whether there was a leading intention to give more to one than to the other; whether there was any leading intention to give £2500 to Mrs. *Westmacott* any more than a leading intention to give all the residue to Mrs. *Plummer;* and certainly it would not be carrying into effect the intention

(1) 13 Sim. 199.

of the testatrix to give Mrs. *Westmacott* £2500 and a share of the residue, the appointment of which would be void under the declaration of the Vice-Chancellor. He says it is no doubt good down to a particular point, and would have been good if it had stopped there. That would be true of nearly every exclusive appointment. I confess I cannot see why you should stop there any more than you should stop if all the gifts had been given in sums by one clause. It appears to me, therefore, that up to that point the conclusion of the Vice-Chancellor is not to be sustained.

During the first part of the argument I was very much disposed to decide upon the construction of the words "all the other real or personal estate," but I think one must construe the clause as if there were no rule of law violated. It would never do for the Court to be construing a thing one way where there is no rule of law violated, and another way if there were such a violation. I think the proper course is to construe it in exactly the same way as if this had been an exclusive power. If so, there can be no doubt, in my mind, that this residuary clause would have carried the whole.

Solicitors: Messrs. *Rennolls;* Messrs. *Langley & Gibbon;* Messrs. *Poole & Hughes;* Messrs. *Deane & Chubb.*

L. JJ.

1870

Nov. 24;
Dec. 15, 19;

1871

Jan. 16.

WATTS *v.* KELSON.

Easement—Unity of Ownership—Artificial Watercourse—Continuous Easement —Easement of Necessity—Carriage or Footway.

In the year 1860 the owner of properties *A.* and *B.* made a drain from a tank on property *B.* to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on property *A.* for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property *A.* to the Plaintiff, with all waters, watercourses, &c., to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof, or as appurtenant thereto. The Plaintiff had the use of the water after his conveyance, until the Defendant, a subsequent purchaser of property *B.*, stopped it:—

Held (reversing the decision of the Master of the Rolls), that the watercourse was a continuous easement necessary for the use of property *A.*, and would have passed by implication; that the Plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it:

Held, further, that the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which the Plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle-sheds.

Pyer v. *Carter* (1) approved.

Dicta in *Suffield* v. *Brown* (2) questioned.

Semble, if the owner of a house and land makes a formed road over the land for the apparent use of the house, and conveys the house separately from the land, with the ordinary general words, a right of way over the road will pass.

The conveyance to the Plaintiff granted to him a right of way through the gateway of the vendor (which opened into a close afterwards bought by the Defendant), to a wicket-gate to be erected by the Plaintiff at a given point into a piece of garden ground, part of the premises purchased by the Plaintiff. The Plaintiff built a cart-shed on this piece of garden ground close to the point where the wicket-gate was to be, and claimed a right of carriageway to it:—

Held, by the Master of the Rolls, that the Plaintiff was not confined to a right of footway, but was entitled to a right of way for all purposes.

THIS was an appeal by the Plaintiff from a decree of the Master of the Rolls, so far as it dismissed part of his bill. The suit was brought to maintain an alleged right of way by the Plaintiff over

(1) 1 H. & N. 916. (2) 12 W. R. 356.

the Defendant's premises to the Plaintiff's premises, and an alleged right to the uninterrupted flow of water along an artificial watercourse through the Defendant's premises to the Plaintiff's. The Master of the Rolls decided in favour of the Plaintiff respecting the right of way, but dismissed so much of the bill as related to the watercourse, and gave neither party the costs of suit.

The Plaintiff and the Defendant were the owners and occupiers of two adjoining properties, which, up to January, 1863, belonged to a single owner; but on the 10th of January, 1863, *John Graham Foley*, the then owner of the two properties, conveyed to the Plaintiff the premises in respect of which the easements were claimed, which then consisted of a cottage residence and a large number of stalls for feeding cattle, with a yard and outbuildings belonging thereto, and a few acres of land. The premises were conveyed, together with (amongst other general words) "all roads, ways (and particularly a right of way through the gateway of the said *J. G. Foley*, which opens into [here was described one of the closes of the vendor, which had since become the property of the Defendant] to a wicket-gate to be erected by the said *C. Watts*, leading into the hereinbefore described piece or part of garden ground [part of the premises conveyed], which gate and wicket-gate are shewn in the plan by the letters *A* and *B*), waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof or appurtenant thereto."

On the 11th of June, 1863, *Foley* conveyed to one *Collins* the property over which the easements were claimed. The Defendant purchased in 1868 from *Collins*.

A small natural stream flowed from the Defendant's premises to the Plaintiff's premises, and at the time of the conveyance to the Plaintiff there was near to the house purchased by the Defendant, and on the ground purchased, a tank which stopped the natural flow of the water, and an artificial drain or culvert into which the water flowed from the tank through a considerable distance to another tank also in the property purchased by the Defendant, and from that tank there were two pipes which conducted the water to the yard of the Plaintiff's cattle-sheds, where

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it could be used by the occupier of the Plaintiff's premises for any purpose that he required. This artificial watercourse was originally made for the express purpose of supplying the cattle-sheds with water, and was made by the owner of both properties. According to several of the witnesses it was not originally supplied with water from the upper tank, but from a lower part of the stream. It was admitted, however, that as early as the year 1860 the connection was formed between the upper tank and the drain which conducted the water to the lower tank, and that from that time the lower tank was exclusively supplied with water from the upper tank. Water was thus obtained much more pure than if it was taken from the stream after it had entered the Plaintiff's land.

It was alleged by the Defendant that the Plaintiff having, after he purchased his own property, become in the year 1864 tenant of the property now belonging to the Defendant, had altered the upper tank by making a hole in its lower side, and placing an iron hatch over the hole, and that the effect of this was to raise the water in the tank, and to increase the flow of the water through the artificial watercourse. The Court, however, came to the conclusion, upon the evidence, that before the iron hatch was placed on the tank there had been a wooden hatch, or some wooden contrivance, which practically served the purpose of raising the water in the tank, so as to cause it to flow freely down the artificial watercourse to the lower tank, and that the Plaintiff was not proved to have made any such alteration in the watercourse as could affect any right to the water he might otherwise have.

The cattle-sheds no longer existed on the Plaintiff's land, their place being occupied by cottages, and the water being used by the tenants for domestic purposes.

As regards the right of way, the position of the points *A* and *B*, which were distant only a few yards from each other, was not in dispute. The gate *A* was a gate which would admit carriages. The Plaintiff, for some time after his purchase, was the tenant of the property subsequently purchased by the Defendant. He did not erect a wicket-gate at *B*, but erected a cart-shed on that part of the piece of garden ground which was nearest to the point *B*, and used the space between *A* and *B* as a way for bringing carts

to it. The Defendant obstructed this way, alleging that the right granted to the Plaintiff by his conveyance was only a right of footway.

The Plaintiff filed his bill to establish his right to the use of the water, and to a carriageway from *A* to *B*, and for an injunction to restrain the Defendant from interfering with those rights. The Master of the Rolls held that the Plaintiff had shewn a right to the carriageway, but dismissed the bill so far as related to the right of water (1).

(1) At the hearing before the Master of the Rolls, the following cases were referred to as to the right of way: *Allan* v. *Gomme* (11 Ad. & E. 759); *Henning* v. *Burnet* (8 Ex. 187); *Iveson* v. *Moore* (3 Ld. Raym. 291); *Skull* v. *Glenister* (16 C. B. (N.S.) 81); *Lawton* v. *Ward* (1 Ld. Raym. 75); *Williams* v. *James* (Law Rep. 2 C. P. 577); *Ballard* v. *Dyson* (1 Taunt. 279); *Jackson* v. *Stacey* (Holt, N. P. C. 455).

1870. April 25.

LORD ROMILLY:—

In this case I was desirous of reading the evidence, but in my opinion the case is a very clear one. The question arises in this way: The Plaintiff bought a certain property from a person under whom the Defendant claims afterwards, and he claims a right to water and a right of way. The right to water, when one understands the facts of the case, is clearly disproved. The water does not come upon his land except by a pipe which was placed for that purpose, and which was made by the owner when he was joint owner of both properties; and thus the case is exactly within the decision which I came to in *Thomson* v. *Waterlow* (Law Rep. 6 Eq. 36), and which has subsequently been approved by the Court of Exchequer in *Langley* v. *Hammond* (Law Rep. 3 Ex. 161); there being only six years, or rather less than six years, since he has had the use of the water. It is quite clear that he can have no right to it under those circumstances, and that the Defendant has an absolute right to put an end to it whenever he pleases. It would have required some especial grant in express words to have given him this right, and it was well observed in the argument, that where an express right was wanted and given, the parties were well competent to give it, for with respect to the matter of the right of way, the deed gives it in express words, and expressly states what the right of way is which he is to be entitled to. I am of opinion, therefore, that so far as relates to the right to the water, the bill must be dismissed.

With respect to the right of way, although the question upon the authorities is certainly a very difficult one, and it is difficult to reconcile all the cases upon the subject, I am of opinion that the Plaintiff has made out his case to a right of way. The right of way is a right really, as far as I can make out, of something like ten yards—not more. By the deed there is an express grant of a right of way through the gate into the field to the wicket-gate to be made in his garden. The wicket-gate has not been made in his garden, but instead of making a wicket-gate (all persons agree where the place was to be), he has put up a cart-shed, and he has taken carts

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The Plaintiff appealed.

Mr. *Amphlett*, Q.C., and Mr. *T. A. Roberts*, for the Appellant:—

The watercourse was made for the use of that part of the property which was afterwards sold to the Plaintiff, not for the convenience of that part which now belongs to the Defendant. The Master of the Rolls observed on the circumstance that the right of way was expressly granted—the right of water not; but the obvious answer is, that the way was a new creation. His Lordship thought that the case was governed by *Thomson* v. *Waterlow* (1), which was approved in *Langley* v. *Hammond* (2), but those were not cases of a continuous easement. *Wardle* v. *Brocklehurst* (3) is very similar to the present case. *Suffield* v. *Brown* (4) is in our favour, for Lord *Westbury*, in his observations on *Pyer* v. *Carter* (5), considers the priority of conveyance material, and our conveyance is the first.

[The LORD JUSTICE MELLISH:—I think that the order of the

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into this cart-shed. Now there is nothing in the grant of the right of way to limit it to a right of way on foot, or to a horse, or to prevent him from driving a cart or a carriage there. And, in fact, by the argument it is admitted, that if it was for the purpose of going merely to the wicket-gate in the garden, then it would be fit and proper to use a cart; but that you must not use it for another and a different purpose; and that the moment you do not use this close as a garden then you lose the right of way. That you are to read this as a grant of a right of way to the wicket-gate to be made going into the garden so long as, and no longer, than the said close shall be continued to be used as a garden. I am of opinion that that is not to be found in the cases that are decided upon this subject, although I admit that they are very difficult to reconcile; and Mr. *Gale*, in his very useful book upon the subject, seems to have found a very great difficulty about it himself, for he does not pretend to be able to reconcile all the cases, but suggests very much that it must depend upon this, whether the burden is more onerous than that which was originally intended. That is an extremely thin distinction, and is also one to which it would be extremely difficult to give effect. It is very difficult to say whether one burden would be more onerous than another with respect to a right of way.

I am of opinion, on the construction of this deed, that this is meant to give the Plaintiff a right of way for all purposes up to that particular point. Therefore I am of opinion that he is entitled to that, and I will, if he wishes it, make a declaration to that effect. I shall dismiss the bill as to the rest, and give no costs. It is a squabble between two neighbours who ought to have settled it between themselves. They are both right and both wrong.

(1) Law Rep. 6 Eq. 36.
(2) Ibid. 3 Ex. 161.
(3) 1 E. & E. 1058, 1065.
(4) 12 W. R. 356.
(5) 1 H. & N. 916.

two conveyances in point of date is immaterial, and that *Pyer* v. *Carter* (1) is good sense and good law. Most of the Common Law Judges have not approved of Lord *Westbury's* observations on it.

The LORD JUSTICE JAMES:—I also am satisfied with the decision in *Pyer* v. *Carter*.] 12 L.T.D. 36

Polden v. *Bastard* (2) and *Worthington* v. *Gimson* (3) shew that a continuous easement over another property of the grantor will pass without express words, where a discontinuous one would not, if such easement is necessary to the enjoyment of the property conveyed. *Ewart* v. *Cochrane* (4) and *Hinchcliffe* v. *Earl Kinnoul* (5) shew what is meant by "necessary." The observations in *Suffield* v. *Brown* (6) shew that Lord *Westbury* would have decided this case in our favour, on the ground that a grantor cannot derogate from his own grant. I do not dispute the decision in *Thomson* v. *Waterlow* (7), but it does not affect us. *Nicholas* v. *Chamberlain* (8) is identical with this case.

The LORD JUSTICE JAMES:—*Thomson* v. *Waterlow* comes to little more than this: You have a way from the high road to your house, a way from the house to your garden, from your garden to your orchard, and from your orchard into your field, to which there is another approach. Nobody could say that a person who bought the field from you would have a right to use the way through your house, garden, and orchard. 12 L.D. 36

Mr. *Southgate*, Q.C., and Mr. *W. Barber*, for the Defendant:—

The watercourse was used for supplying cattle-sheds at the time of the conveyance, and the Plaintiff can only claim what was then enjoyed.

[The LORD JUSTICE MELLISH:—Is not *Wardle* v. *Brocklehurst* (9) against you on that? 12 L.D. 36

The LORD JUSTICE JAMES:—What difference does it make to you that the water is used for a different purpose?]

In *Wardle* v. *Brocklehurst* the easement was apparent. *Thom-*

(1) 1 H. & N. 916.
(2) Law Rep. 1 Q. B. 156.
(3) 2 E. & E. 618.
(4) 4 Macq. 117.
(5) 5 Bing. N. C. 1.
(6) 12 W. R. 356.
(7) Law Rep. 6 Eq. 36.
(8) Cro. Jac. 121.
(9) 1 E. & E. 1058.

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son v. *Waterlow* (1) and *Langley* v. *Hammond* (2) govern the present case, the right claimed not having existed before the unity of possession, which makes a material difference. We contend that, in order to make *Pyer* v. *Carter* (3) applicable, the easement must be one necessary to the enjoyment of the dominant tenement. Here there is no necessity, as there is a natural stream on the Plaintiff's lands. The right claimed here is very like the right to use a pump, which was held not to pass in *Polden* v. *Bastard* (4). *Russell* v. *Harford* (5) is against the Plaintiff. The question of implied grants is treated of in *Gale* on Easements (6), and the rule deduced from the cases is against the passing of the right here: *Pheysey* v. *Vicary* (7); *Hinchcliffe* v. *Earl Kinnoul* (8). In *Pearson* v. *Spencer* (9) the decision in *Pyer* v. *Carter* is spoken of as a strange decision. In *Nicholas* v. *Chamberlain* (10) the facts are not stated, and it is therefore of little value. There are here no express words of grant, and this right cannot pass under the general words, for it was not a right, nor was it appurtenant: *Barlow* v. *Rhodes* (11). In *Plant* v. *James* (12) the easement existed before the unity of possession.

[The LORD JUSTICE JAMES:—Can that make any difference?]

The case is similar to *Thomson* v. *Waterlow*. What difference can there be between a right of way and a right to water?

The LORD JUSTICE MELLISH:—When a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property; but when there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field.

(1) Law Rep. 6 Eq. 36.
(2) Ibid. 3 Ex. 161.
(3) 1 H. & N. 916.
(4) 4 B. & S. 258; Law Rep. 1 Q. B. 156.
(5) Law Rep. 2 Eq. 507.
(6) 4th Ed. pp. 85, 114, n.
(7) 16 M. & W. 484.
(8) 5 Bing. N. C. 1.
(9) 3 B. & S. 761, 762.
(10) Cro. Jac. 121.
(11) 1 C. & M. 439.
(12) 5 B. & Ad. 791.

Mr. *Amphlett*, in reply:—

In *Thomson* v. *Waterlow* (1) and *Langley* v. *Hammond* (2) there was no made road. Suppose a road made to a house, and running for a short distance over other land of the owner: if the owner sells the house, can he stop the purchaser from using the road?

Jan. 16. The judgment of the Court was delivered by

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SIR G. MELLISH, L.J., who, after stating the facts as to the watercourse, continued:—

The real question to be determined is: Did the indenture of the 10th of January, 1863, convey to the Plaintiff any right to the benefit of the artificial watercourse above described? The Master of the Rolls has held, on the authority of *Thomson* v. *Waterlow* and *Langley* v. *Hammond*, that, because the artificial watercourse was first made and begun by a person who was owner of both properties, and had no prior existence at a time when the properties were separately owned, the general words in the conveyance were not sufficient to pass the right. *Thomson* v. *Waterlow* and *Langley* v. *Hammond* were both cases of rights of way, and we cannot but think that, in the decision of the Master of the Rolls, the well-established distinction between easements, like rights of way, which are only used from time to time, and what are called continuous easements, has been overlooked. In *Polden* v. *Bastard* (3), Chief Justice *Erle*, delivering the unanimous judgment of the Exchequer Chamber, says: "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that upon a severance of tenements easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language shews an intention that they should pass."

We are clearly of opinion that the easement in the present case

(1) Law Rep. 6 Eq. 36. (2) Law Rep. 3 Ex. 161.
(3) Law Rep. 1 Q. B. 156, 161.

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was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule, as laid down by Chief Justice *Erle*, the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule; but if words of grant are necessary, we also think that the general words in this case are amply sufficient to pass the easement. It was a watercourse with the premises at the time of the conveyance used and enjoyed. We may also observe that, in *Langley* v. *Hammond* (1), Baron *Bramwell* expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words. We do not think it necessary to go through the large number of cases cited in the argument, and it will be sufficient to refer to two or three of them.

In the old case of *Nicholas* v. *Chamberlain* (2) it was held by all the Court, upon demurrer, that if one erects a house, and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduits and pipes pass with the house, because they are necessary and *quasi* appendant thereto. This case has always been cited with approval, and is identical, not only in principle, but in its actual facts, with the case now before us. It was expressly approved of by Lord *Westbury* in *Suffield* v. *Brown* (3), where, though he objected to the decision in *Pyer* v. *Carter* (4), in which it was held that a right to an existent continuous apparent easement was impliedly reserved in a conveyance by the owner of two houses of the alleged servient houses, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first.

(1) Law Rep. 3 Ex. 161.
(2) Cro. Jac. 121.
(3) 12 W. R. 356.
(4) 1 H. & N. 916.

Wardle v. *Brocklehurst* (1) is also a direct authority, that by a grant of a farm with the usual general words the benefit of a culvert and a stream of water running through the lands of the vendor to the farm granted passed; and Lord *Campbell* says: "The land must be taken to be conveyed in the state in which it then was; that is, we must take it that the culvert so bringing down the water and all the watercourses are granted, not only those which belong and appertain to the premises, but also those which were used and enjoyed therewith." This judgment was affirmed in the Exchequer Chamber, and it was held that the Defendant was entitled to use the water not only for the farm which was sold to him, but for a manufactory which he possessed beyond.

It was objected before us, on the part of the Defendant, that on the severance of two tenements no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the watercourse was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water; and we think it is no answer that, if this supply was cut off, possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained. We are also of opinion, having regard to the general words in the conveyance, that the language of the conveyance was sufficient to pass the right to the watercourse, even if it was not necessary, but only convenient for the use of the premises. It was further objected, that the fact of the Plaintiff having pulled down the cattle-sheds and erected cottages in their place, deprived him of the right to the use of water. We are of opinion, however, that what passed to the Plaintiff was a right to have the water flow in the accustomed manner through the Defendant's premises to his premises, and that when it arrived at his premises he could do what he liked with it, and that he would not lose his right to the water by any alteration he might make in his premises. On the whole, we are of opinion that the judgment of the Master of the Rolls, on the part of the case relating to the watercourse, ought to

(1) 1 E. & E. 1058. 6 Jur. N.S. 322

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be reversed, and that the Defendant must be restrained by a perpetual injunction from obstructing and diverting the said stream and watercourse, so as to prevent the same from flowing through the Defendant's premises to the Plaintiff's in the course and manner in which it used to flow at the time of the execution of the conveyance to the Plaintiff of the 10th of January, 1863, or in any way preventing or hindering the Plaintiff and the tenants and occupiers of his said hereditaments and premises from having the full use and enjoyment of the said stream, and the water thereof, in the manner in which the same was used and enjoyed before and at the time of the said conveyance. We are also of opinion that the Plaintiff should have the general costs of suit in the Court below, but that there should be no costs of this appeal.

Solicitors: Mr. *R. W. Roberts*; Mr. *Thomas Horwood.*

L. JJ. 1871. *Jan.* 16, 17, 18, 19.

In re IRRIGATION COMPANY OF FRANCE. *Ex parte* FOX.

Winding-up—Amalgamation—Sale to new Company—Companies Act, 1862, *s.* 161—*Dissentient Shareholder.*

A company which was in difficulties duly passed a resolution for voluntary winding-up, with a view of disposing of its undertaking, which was carried on in *France*, to a French company to be formed for the purpose; and at the same time it passed other resolutions as to the transfer to the French company, and a special resolution altering the articles of association, so as to give power to carry out the arrangement without giving dissentient shareholders the option to receive the value of their shares in cash, as provided by the *Companies Act*, sect. 161. These resolutions, except the resolution for winding-up, were passed irregularly, but no shareholder dissented from them except one fully paid-up shareholder, who applied to the company to pay him the value of his shares, which was refused. He then presented a Petition praying that the company might be wound up compulsorily, or under supervision, or that he might be at liberty to sue in the name of the company to set aside the proposed arrangements, or that the value of his shares might be ascertained and paid. Vice-Chancellor *Malins* having ordered that the value of his shares should be ascertained and paid, and having made no order as to costs, the Petitioner appealed:—

Held, that the order of the Vice-Chancellor was right, for that the resolution to wind up voluntarily having been regularly passed, the Court would not, on the application of a fully paid-up shareholder, interfere with it by ordering

a compulsory winding-up, or a winding-up under supervision, against the wishes of nearly all the shareholders:

Held, further, that the winding-up resolution being good in itself, was not invalidated by being associated with resolutions which were not regularly passed; and whether it would have been invalidated, even if those other resolutions had been *ultrà vires*, *quære*:

Held, further, that leave to sue in the name of the company had rightly been refused, as the resolutions authorizing a transfer to the French company were not *ultrà vires*, but, though irregular, were capable of confirmation:

Held, also, that the special resolution altering the articles while the company was in difficulties, and as a part of the scheme for transfer to the French company, was invalid, and that the Petitioner was entitled to have the value of his shares ascertained and paid, as provided by the *Companies Act*, 1862, s. 161.

THIS was an appeal, by Mr. *C. B. Fox*, from an order of Vice-Chancellor *Malins* made on his Petition.

The Petitioner was a holder of 300 £20 shares, fully paid up, in the company, which was formed in February, 1865, for the purchase and working of certain concessions granted by the French Government for the construction and working of a canal for irrigation in *Provence*. The capital was £800,000, divided into 40,000 shares. The articles gave power "To take all steps necessary to constitute the company a *Société Anonyme* in *France* if the directors shall think fit, and to apply for and accept such statutes, laws, or decrees of the government of that empire as the directors think requisite for securing the property and rights of the company, and to appoint any representative or representatives of the company in *France* or elsewhere."

The company was brought out by the *Crédit Foncier and Mobilier of England, Limited*, and large sums were advanced by the *Crédit Foncier* for the purposes of the undertaking, for securing which the company gave bonds which were to be disposed of by the *Crédit Foncier*. The *Crédit Foncier* also became the holder of a considerable number of shares in the company, and other shares were held by shareholders in the *Crédit Foncier*.

In the year 1869, the works being incomplete, and the company in a state of great embarrassment for want of funds, and difficulties being found in the way of the carrying on by an English company of works in *France*, it was considered desirable to make arrangements for converting the company substantially into a French company. In the course of the same year the shareholders not

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connected with the *Crédit Foncier* having become dissatisfied with the way in which the affairs of the company were managed, procured the appointment of a new chairman and two new directors, and an agreement was after this come to between the company and the *Crédit Foncier* as to the accounts pending between them. Arrangements were also made for the formation of a new French company, which was to purchase the company's undertaking.

On the 30th of November, 1869, notice was given to the shareholders of a meeting to be held on the 10th of December for the following purposes:—1. To consider and, if approved, to pass a special resolution to the effect that the article hereinafter mentioned should be added to the articles of association 2. To confirm a certain agreement entered into between the company and the concessionaires as to arrangements for the formation of the new company. 3. To resolve that the company be dissolved and wound up voluntarily, and to determine the time, mode, terms, and conditions at, in, and upon which the dissolution and winding-up should take place. 4. To pass a special resolution appointing liquidators, and conferring upon them such powers as might be considered necessary or expedient, including all such powers as might enable them to transfer all the rights and property of the company to the French *Société Anonyme* in exchange for shares therein, on condition that such *Société Anonyme* adopted and paid the liabilities of the company. 5. To approve the statutes of the French *Société Anonyme.*

At the meeting on the 10th of December the following resolutions were passed:—

(1.) That the following article be added to the articles of association, namely:

"In case the company shall be wound up voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company or *Société Anonyme*, English or French, and whether then already existing or to be formed for the purpose of purchasing such business or property, or any other purpose, the liquidators of this company may, with the sanction of a special resolution of this company, conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, sell or transfer such business or property in

consideration wholly or in part of, or receive in compensation or part compensation of any transfer or sale, shares or any like interest in such other company or *Société Anonyme*, for the purpose of distribution amongst the members of this company, or may enter into any other arrangement whereby the members of this company may, in lieu of receiving cash, shares, or other like interest, or in addition thereto, participate in the profits of, or receive any other benefit from, the purchasing company or *société*. And any sale made or arrangement entered into by the liquidator in pursuance of this article shall be binding on the members of this company. No special resolution shall be deemed invalid for the purposes of this article by reason that it is to be passed antecedently to or concurrently with any resolutions for winding up the company or for appointing liquidators."

The second resolution approved of the agreement with the concessionaires.

(3.) "That the company be wound up voluntarily."

(4.) Appointed liquidators.

(5.) "That, except as hereafter may be expressly declared to the contrary, every power given by the *Companies Acts*, 1862 and 1867, or hereafter given by the company to the liquidators, may be exercised by them."

(6.) "That, without limiting the general powers possessed by the liquidators, the following special powers be conferred on them (that is to say):

To convey to a new French company (*Société Anonyme*) the real and personal properties and rights of the company, with or without exception or reservation, on condition that such new company provides, pays for, and adopts all or part of the liabilities with which those properties or rights are charged, or to which they may become liable.

To aid in the formation of such *Société Anonyme*, &c. &c.

To do everything which may be necessary to put the *Société Anonyme* in possession of the property and rights of the company, and, in exchange for the same, to accept the number and value of shares in the *Société Anonyme*, which may be determined by the statutes or any supplemental deeds."

(7.) Related to the remuneration of the liquidators.

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(8.) "That the liquidators have the power, and they are hereby authorized, in distributing the shares of the said French *Société Anonyme* amongst the shareholders in this company, to apportion such shares in manner following (that is to say), to each shareholder whose shares are fully paid up, one share in the *Société Anonyme* for every two shares which he holds in this company. And the liquidators shall be authorized to deal with and dispose of the surplus shares (if any) as they shall in their absolute discretion think best in the interests of the company."

On the 30th of December these resolutions were confirmed.

On the 4th of January, 1870, the Petitioner gave notice to the liquidators that he dissented from the arrangement, and required them to exercise the option given them by the *Companies Act*, 1862, sect. 161. No reply having been returned, he, on the 24th of January, wrote asking for a reply to his notice, and on the 1st of February the secretary replied that the transfer was being effected, not under sect. 161, but in pursuance of the powers contained in the articles of association, as recently amended by special resolution, and that the Petitioner was not entitled to call upon the liquidator to exercise the option referred to in his notice. On the 4th of February the Petitioner again applied to have his interest ascertained and purchased, and on the 7th the solicitors of the liquidators replied: "We have to inform you that you are not entitled to require your interest in the company to be purchased, or to have the value of such interest ascertained by arbitration."

The arrangements proceeded, and the French company was incorporated according to the law of *France*.

On the 28th of February, 1870, the Petitioner presented his Petition, containing charges against the chairman and directors who conducted the above transactions, and impeaching the scheme as formed without any regard to the interests of the independent shareholders in the company, and as being *ultrà vires*. The Petition prayed: 1. That the company might be ordered to be wound up compulsorily; 2, or that the voluntary winding-up might be continued under the supervision of the Court. 3. That the Petitioner might be at liberty to take such proceedings as he might be advised for the purpose of impeaching and setting aside the said scheme

and transactions with the French company, and for that purpose to use the name of the company. 4. Or, in case the Court should be of opinion that the Petitioner was not entitled to such relief, then that the value of the Petitioner's shares might be ascertained and paid.

On the 16th of April, 1870, the Petitioner was served with a notice of motion, by a committee appointed at a meeting of shareholders, that the arrangements made by the liquidators with the French company might be confirmed.

The Petitioner gave notice of motion for an injunction to restrain the liquidators from parting with the assets of the company to the French company; and on the 23rd of April, 1870, an interim order was made, restraining the liquidators from making over the property to the French company until a sum of £7000 was brought into Court, as security for the value of the Petitioner's shares, and the two motions were ordered to stand over till the hearing of the Petition. The required sum was brought into Court, and the liquidators being thus relieved from the injunction, completed the arrangements with the French company, and made over the property.

The Petition came on to be heard before Vice-Chancellor *Malins*, who held that the only right of the Petitioner was to have the value of his shares ascertained and paid to him. His Honour considered that the refusal to give him the value of his shares was wrong, and that the Petitioner, on the other hand, was to blame for bringing forward charges of misconduct which he could not establish. His Honour accordingly dismissed, without costs, as much of the Petition as asked for a compulsory winding-up, or winding-up under supervision, and as asked liberty to file a bill; directed an inquiry as to the value of the Petitioner's shares on the 3rd of December, 1869, if he gave the liquidators notice in writing before the 6th of December, 1870; but if he did not, then directed the value to be ascertained by arbitrators under the *Companies Act*. His Honour retained in Court £4000 out of the £7000, and ordered the rest to be repaid to the liquidators, who were to retain and pay out of it their own costs and those of the *Crédit Foncier* and the committee of shareholders, but made no order as to the Petitioner's costs. The Petitioner appealed against this order, so far as it

(1) See W.N. (1870) 204.

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refused the relief prayed by the 1st, 2nd, and 3rd paragraphs of the prayer, and by his appeal petition also asked that the motion of the committee of shareholders might be refused with costs.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the Appellant:—

This is a sham winding-up, not authorized by the articles nor by the *Companies Act*, sect. 161. The Court may give us leave to file a bill, as in *In re Imperial Bank of China, India, and Japan* (1), but compulsory winding-up is the preferable course. The winding-up resolution is invalid, being mixed up with a scheme which is *ultrà vires*: *In re Imperial Bank of China, India, and Japan; Imperial Bank of China* v. *Bank of Hindustan* (2); *Clinch* v. *Financial Corporation* (3). The cases of *In re South Barrule Slate Quarry Company* (4) and *Graham* v. *Birkenhead, &c. Railway Company* (5), relied on by the Vice-Chancellor, do not apply. *Hutton* v. *Scarborough Cliff Hotel Company* (6) is against the insertion of the new article, even had it not been done in course of winding up. The transaction is not conformable to sect. 161, and the liquidators repudiated that section, and cannot now avail themselves of it. The notices ought to have stated that the proceeding was under sect. 161: *Imperial Bank of China* v. *Bank of Hindustan*. Such a defect in the notice is fatal: *In re Bridport Old Brewery Company* (7). The original articles did not authorize the transaction, and the company could not, at the same moment, alter the articles and pass a resolution under the altered articles. This Petition is the right form of proceeding: *In re Imperial Bank of China, India, and Japan*. If we are not entitled to compulsory winding-up, we ought to have a supervision order: *In re Beaujolais Wine Company* (8). The value of our shares cannot be properly ascertained, except in a proceeding under which the dealings with the *Crédit Foncier* can be questioned. [They also referred to *Vining's Case* (9).]

(1) Law Rep. 1 Ch. 339.
(2) Ibid. 6 Eq. 91.
(3) Ibid. 4 Ch. 117.
(4) Ibid. 8 Eq. 688.
(5) 2 Mac. & G. 146.
(6) 2 Dr. & Sm. 521.
(7) Law Rep. 2 Ch. 191.
(8) Ibid. 3 Ch. 15.
(9) *Ante*, p. 96.

Sir *Roundell Palmer*, Q.C., for the committee of shareholders:—

The Court will not, unless the winding-up resolution has been unfairly obtained, interfere on the application of shareholders against the wishes of a majority: *In re St. David's Gold Mining Company* (1); *In re London and Mercantile Discount Company* (2); *In re Beaujolais Wine Company* (3). The Petitioner is not entitled to relief in the form of compulsory winding-up: *In re Bank of Gibraltar and Malta* (4); *In re Imperial Bank of China, India, and Japan* (5); *Imperial Bank of China* v. *Bank of Hindustan* (6). The arrangement was *intrà vires*: *In re Agra and Masterman's Bank* (7); *Wright's Case* (8); *In re South Barrule Slate Quarry Company* (9).

Mr. *Cole*, Q.C., and Mr. *Waller*, for the liquidators:—

A paid-up shareholder, who is subject to no liability for debts, cannot present a Petition to wind up, nor can a person whose claim is disputed use it as an instrument for getting his claim submitted to. The cases clearly shew that winding-up will not be ordered by the Court on the application of a shareholder against the wishes of the majority. The refusal to give the Petitioner the value of his shares was, we admit, a mistake; but the order of the Vice-Chancellor gives the Petitioner all that he is entitled to.

Mr. *Cotton*, Q.C., Mr. *Jackson*, and Mr. *Latham*, for the *Crédit Foncier*.

Mr. *Glasse*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Vice-Chancellor's order has given the Petitioner at least everything to which he was entitled. The case has occupied considerable time, and in some respects it is complicated; but it can, as it seems to me, be reduced to a very simple form, if we consider the nature and extent of the jurisdiction that is invoked.

(1) 14 W. R. 755.
(2) Law Rep. 1 Eq. 277.
(3) Ibid. 3 Ch. 15.
(4) Ibid. 1 Ch. 69.
(5) Law Rep. 1 Ch. 339.
(6) Ibid. 6 Eq. 91.
(7) 15 L. T. (N.S.) 408.
(8) Law Rep. 5 Ch. 437.
(9) Law Rep. 8 Eq. 688.

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The Petition unites two somewhat inconsistent cases. It asks for a compulsory winding-up on the ground that there is no winding-up at all, and it asks then—on the footing of there being a winding-up—for the direction and assistance of this Court in the winding-up.

Now, how does the case stand upon the application for a compulsory winding-up? A compulsory winding-up can only be given in one of the cases pointed out by the statute. Now, when this Petition was presented, no one of the things had happened which are specifically mentioned in the Act as entitling a shareholder to ask for a compulsory winding-up. The only way in which an order for that purpose could have been made would have been by a sort of equitable application of sect. 79, sub-sect. 5, "whenever the Court is of opinion that it is just and equitable that the company should be wound up;" and apart from that clause, there was no jurisdiction to make such an order. A great deal has been said of the right which a shareholder has on behalf of himself and all other shareholders to restrain a company, even where every shareholder but himself is acquiescent, from doing that which is *ultrà vires*. That right is clear, and I do not mean to throw the slightest doubt upon it. But it does not follow that, because a company is about to do something, or has done something, which is *ultrà vires*, a shareholder has a right to come here under this summary jurisdiction, and ask for a compulsory winding-up. His right is to take such proceedings as he may be advised, in the name of himself and the other shareholders, to restrain the company from doing that which is alleged to be illegal.

But then it is said that in this case, although a resolution for voluntary winding-up was regularly passed and duly confirmed, that resolution is so mixed up with something *ultrà vires*, and that voluntary winding-up was so manifestly resolved upon for the sole purpose of doing what was *ultrà vires*, that it would be just and equitable to make a compulsory winding-up order, because the voluntary winding-up order must, under such circumstances, put the company in a state of inextricable difficulty from which it can only be extricated by a compulsory winding-up by the Court. In support of that proposition, reference has been made to the *dictum* of the Lord Justice *Turner* in the case of *In re Imperial Bank of*

China, India, and Japan (1), and to the subsequent decision by Vice-Chancellor *Giffard* in the suit of the *Imperial Bank of China* v. *Bank of Hindustan* (2). In that case there was a Petition, on which the Petition in this case seems to have been founded, and the Lord Justice *Turner* expressly said that, if the resolution for winding-up was mixed with an illegal scheme so as to be part of it, the winding-up resolution must fail with the rest of the scheme. But in that very case the Lords Justices made an order enabling the shareholder to file a bill in the name of the company, which order they had no jurisdiction whatever to make, except upon the footing that there was a voluntary winding-up, in which, under the 138th section of the *Companies Act*, 1862, a shareholder could come here to have the assistance and direction of the Court for the purpose of obtaining justice. The order, therefore, did not treat the winding-up as void. In that case the Court thought it right to allow the Petitioner to use the name of the company to get back the assets where there was an attempt at amalgamation, as it is called, which, beyond all question, was *ultrà vires*. The Petitioner accordingly filed such a bill, and when the cause came on to be heard before the Vice-Chancellor *Giffard*, he gave to the few dissentient shareholders the relief sought; but the ground of relief was this, that the act complained of was not merely improper, but *ultrà vires*, and incapable of being confirmed by anything short of the acquiescence of every single member of the company. In the present case I not only am not satisfied that what was proposed to be done was *ultrà vires*, but I am satisfied that it was *intrà vires*. I am satisfied that, upon proper notices being given and upon proper consideration, the company had the right to do, and had and has the right to confirm, what was here done; that is, under the 161st section they had a right to authorize the liquidators to sell and convey the assets of the company in exchange for shares in the company which was being formed in *France* for the purpose of saving the property from the ruin in which it would otherwise have been involved. I am bound to say that, in my opinion, the notices were not proper notices, that there was informality and irregularity in the proceedings; still, what was done was and is capable of being confirmed by the company. Now, whenever a

(1) Law Rep. 1 Ch. 339, 347
12 Jur. N.S. 423.

(2) Law Rep. 6 Eq. 91.

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thing is capable of being confirmed by a company, a shareholder has no right, and it is not the duty of this Court to give him a right, to use the name of the company for the purpose of setting it aside. His remedy is to proceed within the company, and to get the company to take steps to set aside what has been done; and if he files a bill to set aside the transaction as prejudicially affecting his interests, he must do so at his own risk. There being, then, as it seems to me, no ground for a compulsory winding-up order, or for giving leave to file a bill in the name of the company, the question is, ought we to interfere with the voluntary winding-up? That winding-up has proceeded with the assent of the Petitioner himself to this extent, that he asked for the value of his shares, which he could only claim under sect. 161 and in winding-up. It is to be regretted, as the Vice-Chancellor observed, that his letter asking for the purchase of his shares at a valuation was not immediately acceded to by the company; but, however, in asking for it he asked for something arising only in the winding-up. More than that, he has applied to this Court in the winding-up, and obtained upon his own application an injunction to restrain the proceedings until security was given for the value of his shares. Now that was an order which this Court had no jurisdiction to make otherwise than under the 138th section, and in a winding-up then proceeding. He thus adopted the voluntary winding-up.

Moreover, the *Companies Act* says distinctly that this Court, in considering the question whether there is to be an interference with the voluntary winding-up, is to have regard to the wishes of the contributories and creditors. Now obviously their wishes are that there should be no such interference. More than that, it has been laid down in several cases that this Court will not, upon the application of a contributory, interfere with a voluntary winding-up unless there be some case of fraud or overbearing influence in obtaining the winding-up resolution. If there be a case of that kind, the Court may think it right to continue the winding-up under supervision, which appears to me to be going as far as the Court ought to go where the question arises only between a contributory and his co-contributories. But there is no evidence to satisfy me that in the present case there was anything fraudulent or improper in the object of the winding-up or in the mode of obtaining the

resolution for winding up. It is said that there were 5000 shares belonging to the *Crédit Foncier*, and many other shares belonging to their nominees; but the *Crédit Foncier* were shareholders as well as creditors; they had a right to vote, and it appears that there was a very large number of independent shareholders, to the extent of many thousands of shares, who assented to and approved of all that was taking place. Far from being satisfied that there was anything improper in the substance of what they were doing (though there may have been some impropriety in form), I am satisfied that there never was a more honest attempt to get a ruined company out of its ruin than was made in this case, and I am shocked at the imputations which have been thrown, and, as it appears to me, without the slightest colour or pretence, upon the gentlemen who were asked by the shareholders in their distress to see what would be best to be done for them, and who seem to me to have done their duty honestly, faithfully, and zealously. I therefore see no ground for throwing the imputation which I must throw upon what took place at that meeting, if I were to say that there ought to be a supervision order against the wishes of the contributories.

Now, the Appellant had one ground of complaint. He, no doubt, was entitled to have the value of his shares ascertained under the 161st section, as he did not choose to take the shares in the French company, and it was illegal to attempt, at the meeting of the 10th of December, to alter the constitution of the company by introducing an article which would have deprived dissentient shareholders of any such right. But, assuming that article to be void, as it appears to me clearly to be—assuming that there was no sufficient notice of a proceeding under the 161st section, that still is a mere irregularity which can be set right, and which the great majority of the shareholders who approve of what has been done are ready to set right.

That being so, the only thing to be seen to is, that this gentleman has all his rights secured to him. Now, his right is not a right to throw everything into confusion by undoing what has been done. It is not a right to say to the company: "I will ruin you unless you buy me off." He says: "Your proceeding was irregular in attempting to sell without proper notice." That being

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so, he was entitled to come, and did come, to this Court, under the 138th section, to prevent injury to himself as one of the contributories, and he obtained an injunction until the company should bring into Court that sum which the Vice-Chancellor thought was sufficient to secure him his right. If there be any other matter which he has a right to investigate or to complain of, there is nothing to prevent him, under the 138th section, from proceeding by an originating summons against any director or contributory who is liable to pay anything to the company. There is nothing to prevent him doing that under the voluntary winding-up as much as under a supervision order, or under an order for compulsory winding-up. The only distinction is, that the one would upset everything that has been done; the other will allow everything to be done in a way which will secure justice to everybody connected with the company. That being so, I am of opinion that the Petitioner is not entitled to a compulsory winding-up order, that he is not entitled to an order for winding up under supervision, and that there are not here any grounds whatever which can induce this Court to allow him to file a bill in the name of the company for the purpose of setting aside a transaction which, if it required the confirmation of the Court, I should have felt very little difficulty in confirming, as the Vice-Chancellor confirmed the bargain between the old *Agra and Masterman's Bank* (1) and the new bank.

Then the Vice-Chancellor has not thought fit to make any order as to costs. I think the Vice-Chancellor has been indulgent to the Petitioner in this, and it is, no doubt, open to us, as was urged in argument, to alter the order adversely to the Appellant in this respect. This Court, however, is always very slow to meddle with the decisions of the Court below on what must necessarily be a matter of judicial discretion, and upon which it is so difficult to lay down any principle. In this case the Petitioner was right in applying to the Court to have the value of his shares ascertained, and to get relieved from the wrongful refusal of the company to give him that value. If he had confined himself to that he would have been entitled to his costs. He did not do so, but proceeded with allegations, as it appears to me, of a scandalous nature against

(1) 15 L. T. (N.S.) 408.

gentlemen who were doing their best for the company, and he ought to pay the costs of those allegations and the evidence in support of them. The Vice-Chancellor, however, thought that, on the whole, the shortest and simplest mode was to say that there should be no costs, instead of giving the Petitioner costs as to part, and making him pay costs as to another part. I am not disposed to interfere with what the Vice-Chancellor has done in that respect, and if I did interfere it certainly would not be in favour of the Appellant.

On the whole, I am of opinion that the appeal fails, and ought to be dismissed with costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

The first question that I will notice is, whether the resolution for a voluntary winding-up was good. Now, the resolution was passed as far back as the 10th of December, 1869, and confirmed on the 30th; due notices were given, the meetings at which it was adopted and ratified were properly summoned, the resolution itself was carried by the proper majority, and it is not mixed up in itself with any other resolution: it is a simple resolution to wind up voluntarily. Moreover, the state of the affairs of the company was such that, independently of the question of transferring their assets to this new company, there were very strong reasons why the company should be wound up. The company was formed for acquiring certain concessions for constructing canals for irrigation in *France*, it had expended large sums of money in acquiring those concessions and in making the canals, those canals were mortgaged to French creditors, and the company had great difficulty in raising any more money. Beside this, it appears that the company was placed under great legal difficulties in *France*, owing to the Government declining to recognise the legality of the sale to the company of those concessions by the Frenchmen to whom they originally had been granted. Under these circumstances, the real state of facts appeared to be that the company might possibly be turned into a French company, but that *quâ* English company it could not possibly go on. There were, therefore, very strong grounds for coming to a resolution to wind up voluntarily, whatever

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else was done, and such resolution accordingly was come to. That resolution has been acted upon from that time to this; everything has been done by the liquidators, who have superseded the directors, and neither creditor nor shareholder has dissented from it. Mr. *Fox* himself has not dissented from it; on the contrary, he has taken various proceedings which could only be taken on the assumption that the company was being wound up. The only authority cited to shew that the resolution is invalid is the *dictum* of Lord Justice *Turner*, that if the winding-up was part of a scheme which was itself *ultrà vires*, then the winding-up resolution must fall with the scheme. I confess I have great difficulty in assenting to that rule, for it appears to me that if there is passed a winding-up resolution, which is in itself valid, the circumstance that there are other resolutions which authorize the liquidators to do something which they are not entitled to do cannot make the previous resolution bad. Moreover, if such a resolution could, after having been acted upon for several years by everybody connected with the company, be set aside as void *ab initio*, it appears to me that the greatest confusion would arise. I am clearly of opinion, therefore, that the resolution for voluntary winding-up was good.

That being so, we have here the case of a paid-up shareholder, who is under no liability in respect of the debts, coming, without the consent of any other shareholder, to ask for a compulsory winding-up, or for an order continuing the winding-up under the supervision of the Court. Now nothing seems clearer on the authorities than that one paid-up shareholder cannot be entitled to insist on this, unless he makes out a very strong case, such as that the transaction was fraudulent as against him, and that the assets of the company are being altogether wasted. I do not mean to say that there cannot be a case in which he would be entitled to such relief, but beyond all question it would be a strong thing to go against the wishes of all the shareholders except one; and it does not appear that in the present case any other shareholder has assented to Mr. *Fox's* wish that there should be a compulsory winding-up, or a winding-up under the supervision of the Court. The strongest possible case, therefore, must be proved; but no such case has been proved.

Great reliance has been placed upon the relations between this

company and the *Crédit Foncier Company*. I must say that those relations are left a good deal in darkness, but certainly I do not think that any shareholder in this company is entitled to complain that the *Crédit Foncier* has 5000 shares, and has also very large influence in the company. When I turn to the original prospectus, I find that this company was started by the *Crédit Foncier*. It is not a case where an independent company is started, and then the directors of that company, without the consent or knowledge of the shareholders, make arrangements which render the company subject to a credit company in all respects. This was a company which, in the face of day, was started as an offshoot of the *Crédit Foncier*, so much so that in the original prospectus the shares were offered to nobody but to shareholders in the *Crédit Foncier*. How can any one taking shares in a company so started complain if he finds that the *Crédit Foncier* and their directors and shareholders have great influence in the company. Every one knows that when these credit companies were started it was supposed that the profit to be gained by being a shareholder in them was not merely the dividend they gave upon their shares, but that their shareholders were let into a great many good things with which they became connected. After a certain length of time, however, it appears there came to be a considerable number of independent shareholders, that is to say, shareholders whose interest in this company was larger than their interest in the *Crédit Foncier*, if they had any; and those shareholders appear to have complained of the relations between the *Crédit Foncier* and this company; and it may be that there was some ground for their doing so. It appears that these independent shareholders procured Mr. *Cave* to be appointed chairman, and two other persons, Mr. *Young* and Mr. *Morris*, who had great experience in transactions of this kind, and great knowledge of French companies, to be appointed directors. I see no reason to disbelieve the affidavits of Mr. *Cave* and Mr. *Young*, which shew that the negotiations with the *Crédit Foncier* were carried on perfectly *bonâ fide*, for the purpose of rescuing this company from the state in which it was; and I see nothing to convince me that they did not come to a proper agreement with the *Crédit Foncier*. It is absurd to say that if a director, on taking office, finds that great improprieties have been committed, he is bound at once to rush into the Court of

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Chancery, which may probably end in the ruin of the company, and that he is not to consider what course is most likely to get the company out of the difficulties in which it is involved. The *Crédit Foncier* appears to have had a great interest in not bringing the *Irrigation Company* to destruction, and ultimately a perfectly *bonâ fide* arrangement appears to have been come to. Then it was discovered that this company could not go on as an English company, and therefore they formed the best scheme that they could for turning it into, or selling it to, a French company, that being, as they thought, the only means of carrying on the business.

Now, I agree that the company cannot carry this scheme into effect under their original articles of association, nor under articles amended in any such way as they proposed. What they proposed to do was to compel every shareholder in the English company to change his shares into shares in the French company, whether he assented or dissented, and they attempted to vary their articles of association so as to enable them to do this. I am of opinion that they had no power to do that. First, I rather think that it is against the section which says that the memorandum of association cannot be altered; but, whether that be so or not, I am of opinion that it is against sect. 161. Sect. 161 enables them to sell to a company for shares in that company; but with this qualification, that a dissenting shareholder shall be entitled to refuse to accept such shares, and require the value of his shares to be paid in cash. I am of opinion that it is not open to a company, at the moment when it is going to be wound up, to alter its articles for the purpose of carrying out sect. 161, without the proviso in favour of dissenting shareholders. Therefore I am of opinion that the scheme in this respect was *ultrà vires*.

Then comes the question, Was the making over the assets to a French company within the powers of sect. 161? I certainly, during some part of the argument, had a doubt whether the company to which a sale might under that section be made, must not be an English company or some company formed under the *Companies Act*, 1862. On consideration, I am of opinion that this doubt was not well founded. Under the Act of 1862 companies may be formed for carrying on undertakings in any part of the world, and constantly are so formed. Now, when English companies are

formed to carry on undertakings which must entirely depend on the laws of other countries, we cannot be surprised if they find great difficulties in getting on, by reason of the laws of those countries. It is matter of history that a French omnibus company some years ago tried to carry on business in *London* as a French company, and found the legal difficulties practically insuperable. If, then, English companies may be formed for such foreign undertakings, why should they not be allowed, under sect. 161, to sell their interest to foreign companies in the places where they are carrying on their business, it being very likely that such a foreign company is the only body of persons likely to buy their shares and interest at all? It might be certain destruction of the assets if it were to be laid down that no sale can take place to a foreign company. In this very case, as it is hardly possible that an individual French capitalist could be found who would purchase a property of such magnitude, the selling it to a French company may be the only possible means by which the assets can be realised at all.

Therefore, the conclusion I come to is this, that the company could not effect this sale, as they intended, under the articles of association, but they could effect it under sect. 161, though not without giving proper notices. I am also of opinion, on the authority of Lord Justice *Giffard's* judgment in the *Imperial Bank of China*, that the notices that were given were invalid. They ought to have been such that a shareholder would know that they were notices under sect. 161, whereas they proceed on an assumption that the change in the articles of association was good, and a shareholder reading them would not know that if they were passed he would have the option of dissenting, and having his shares paid for in money. Those resolutions having been passed, and being good to the extent I have mentioned, viz., that the company should be wound up voluntarily, and that the liquidators should be appointed, what was the position of Mr. *Fox*, or any other dissenting shareholder? I am of opinion that he was not entitled to have the company wound up compulsorily, nor to have it wound up under supervision, but I think that he was entitled to come to this Court, under sect. 138, and require that the carrying out of the proposed transfer to the French company should be stayed until it was seen whether, when proper meetings of the company were called by the

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liquidators under sect. 161, under proper notices, they would assent or not; and I think he would further be entitled to say that, even if they did assent, the scheme should not be carried out until money to purchase his shares had been provided. What did Mr. *Fox* do? He first required the company to pay the value of his shares. If he was advised that what had been done was probably invalid, he, no doubt, thought it useless to ask for the calling of a new meeting, as he knew that the shareholders would certainly assent to what had been done. Accordingly, waiving everything else, he demanded the value of his shares. The company, unfortunately, as I think, and under bad advice, refused that. Then he presented this Petition, in which he has not asked for that to which I conceive he is entitled—to have the proceedings stayed until it had been regularly ascertained whether the shareholders would assent to what had been done—but he asked for things to which, in my opinion, he was not entitled, to have the company wound up compulsorily or under supervision. I also think he was not entitled to have the liquidators changed, for I do not think that he has proved any one of the charges that he makes against them. Then he asks—and that is a part of the case on which, on the authority of the *Imperial Bank of India, China, and Japan* (1), some doubt may possibly be entertained—for liberty to file a bill in the name of the company to have these transactions set aside. Now, it is plain that if this were to be done it would be the utter ruin of the company. But it was strongly insisted upon that we are bound to grant it, whether it is the ruin of the company or not, and that we shall be altering the law if we do not. I cannot agree with that. There is this distinction between the present case and that of the *Imperial Bank of China, India, and Japan*, that the amalgamation there proposed was *ultrà vires*, for the shareholders were not merely to be required to receive shares of the new company in exchange for the interest they had in the old company, but were to be compelled to make payments for the purpose of getting those shares. That scheme, therefore, was not like this, which, in my opinion, is one which, if the shareholders had properly confirmed it under sect. 161, could be carried out, whereas that was a scheme which nothing short of the assent of

(1) Law Rep. 1 Ch. 339.

every shareholder could enable to be carried out. When the proposed scheme is not *ultrà vires*, but the only defect is that there has not been a proper compliance with the forms of the Act of Parliament, and it is shewn that the great majority of the shareholders wish it carried out, then I think that the proper course is not to give leave to file a bill to have the transaction set aside, at any rate until an opportunity has been given of having a meeting summoned to see whether the shareholders will agree to it. Here I do not think it is necessary to have such a meeting summoned, for the fact is, that the arrangement cannot be set aside. Mr. *Fox* applied for an injunction to restrain the liquidators from carrying out the transfer of the property, and he obtained only an injunction until a certain sum was paid into Court. He did not appeal from this refusal of an absolute injunction, but submitted to the order. The money was brought into Court; the consequence of course was, that the liquidators were set free from the injunction. The amalgamation has been carried out; that is to say, the property which is situate in *France* has been transferred to the French company, according to the French law; the Court has no power to recover it, and the transaction therefore is incapable of being set aside. Still I agree that Mr. *Fox*, having taken his objection to this resolution at a very early stage, is entitled to receive the value of his shares as they were at the date of the winding-up; but he is entitled to nothing more, and his appeal must be dismissed with costs.

Mr. *Cotton*, for the *Crédit Foncier*, asked for costs, on the ground that charges of fraud had been brought against the chairman of that company.

Mr. *Waller*, for the committee of shareholders, asked for their costs, relying on the ground that the Petition of appeal asked that the motion of the committee, upon which the Vice-Chancellor had made no order, might be dismissed with costs.

The LORD JUSTICE JAMES:—We wish it to be distinctly understood that, as a general rule, we do not mean to give more than one set of costs in these matters. In this particular case there was a special relief prayed against the committee of shareholders, and hey appear to defend themselves. They will, therefore, have

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their costs of the appeal, but no costs will be given to the *Crédit Foncier*.

Solicitors: Mr. *B. Hunt*; Messrs. *Ashurst, Morris, & Co.*; Mr. *F. Heritage*.

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Jan. 24, 25.

In re GREAT WHEAL BUSY MINING COMPANY.

KING'S CASE.

Contributory—Transfer of Shares—Purchase in name of a Trustee—Intention to escape Liability—Unregistered Company—Cost-book System—Companies Act, 1862, *s.* 200.

K., the secretary of an unregistered company carried on upon the cost-book system, purchased shares in the company, and had them transferred to a nominee, who was a man of small means, his object being to prevent its being generally known that he was trafficking in shares in the company. The transfer was registered, and about three years afterwards the company was wound up by an order of the Court of Stannaries:—

Held (reversing the decision of the Vice-Warden of the Stannaries Court), that the transaction was a *bonâ fide* purchase of shares in the name of a trustee, and that *K.* could not be put on the list of contributories in respect of them.

Semble, that even if *K.* had purchased the shares in the name of a nominee for the purpose of escaping liability, yet as *K.* was never under any obligation to the company in respect of those shares, he could not be made a contributory.

Cox's Case (1) distinguished.

THIS was an appeal from an order of the Vice-Warden of the Stannaries Court of *Cornwall*, which had been remitted by the Lord Warden to the Court of Appeal in Chancery.

The *Great Wheal Busy Mining Company* was an unregistered company, formed in the year 1856 on the cost-book system. The undertaking was divided into 6000 shares.

In the month of April, 1865, Mr. *H. R. J. Verchild* was the holder of eleven shares. Mr. *Edward King* was the secretary, and Mr. *J. A. M. Cope* was chairman of the managing committee of the company.

In that month *King* and *Cope* purchased 210 shares, through a

(1) 33 L. J. (Ch.) 145.

share-broker, of a Mr. *Sugden*, on a joint account. The shares were then at a low price, and they were speculating for a rise in the market. By the directions of *King* and *Cope*, the broker transferred the shares into the name of *Verchild*, the transfer being dated the 6th of April, 1865. The purchase-money was £312 7*s.* 6*d.*; but as the transferor was in arrear for calls, the purchase-money was paid to the company by *King*, and the shares were registered in *Verchild's* name. Seventy of the shares were afterwards sold to a person named *Hickey*, leaving 140 standing in *Verchild's* name.

It was not denied that *Verchild*, who was a clerk in *Cope's* employment, and a man of very limited means, held the shares as a trustee for *King* and *Cope*, and that he looked to them to indemnify him against the calls which might be made. In a letter from *Cope* to *King*, dated the 3rd of June, 1865, *Cope* explained that he wished the shares to remain in *Verchild's* name, as "a safe name." A settlement of account afterwards took place between *Cope* and *King*, under which *Cope* took the sole interest in the 140 shares; but a suit was now pending in the Court of Chancery for adjusting the respective rights of *Cope* and *King* in this and other purchases of shares.

In August, 1866, the company being much pressed by their creditors, resolved to take steps to wind up their affairs, and on the 22nd of June, 1868, an order for winding up was made in the Court of the Vice-Warden of the Stannaries.

The Registrar, who acted as official liquidator, placed *Verchild's* name on the list of contributories in respect of the 140 shares as well as the eleven which he previously held; but he subsequently applied to the Vice-Warden to rectify the list by substituting the names of *King* and *Cope* for that of *Verchild* for the 140 shares. The Vice-Warden being of opinion that the case was governed by *Cox's Case* (1), made the order asked for, and from this order *King* appealed. *Cope* did not join in the appeal. The Registrar had made a call of £200 in respect of the shares, which *King* paid under protest.

The 14th of the rules and regulations of the company was as follows:—"That the shares of this adventure may be trans-

(1) 33 L. J. (Ch.) 145.

L. JJ. 1871 KING'S CASE.

ferable by notice of transfer in the form usual in *Cornwall*, under the cost-book system, the said transfer being duly accepted by the transferee; and the said notice of transfer shall then be forwarded to the secretary, whose duty shall therefore be to acknowledge the receipt thereof to the purchaser or transferee of such shares, and to register the name in the transfer book: provided always, that no such register of transfer shall be so made by the secretary unless all calls which may have been made and declared upon such shares shall have been duly paid thereon."

Mr. *Fry*, Q.C., and Mr. *Dunning*, for the Appellant:—

The right of the shareholders to transfer their shares to whom they please is unlimited under the 14th rule, and unless the company is *in extremis*, it is no objection that the transfer is to an insolvent person. There was no expectation in this case that the company would be wound up, and the only reason for buying the shares in the name of a trustee was the fear of injuring the company by its being known that the chairman and secretary of the company were buying and selling shares. Moreover, in all the cases in which a transfer to escape liability has been set aside, the person selecting the transferee has been the transferor, who, being a shareholder, was under obligation to the company, and was not allowed thus to escape from it. It was so in *Hyam's Case* (1), in *Costello's Case* (2), and *Ex parte Hatton* (3). There has been no case where a person buying shares in the name of an insolvent person has been put upon the register. *Cox's Case* (4) is no exception, for there a bargain had been made between *Cox* and the company that he should take the shares himself. This is a simple case of shares being purchased in the name of a trustee, in which case the trustee is the only person who can be put upon the list of contributories: *Ex parte Bugg* (5); *Budd's Case* (6); *Fenwick's Case* (7); *Newry Railway Company* v. *Moss* (8); *Walker* v. *Bartlett* (9); *Castellan* v. *Hobson* (10); *In re National Financial Corporation* (11).

(1) 1 D. F. & J. 75.
(2) 2 Ibid. 302.
(3) 31 L. J. (Ch.) 340.
(4) 33 Ibid. 145.
(5) 2 Dr. & Sm. 432.
(6) 3 D. F. & J. 297.
(7) 1 De G. & Sm. 557.
(8) 14 Beav. 64.
(9) 18 C. B. 845.
(10) Law Rep. 10 Eq. 47.
(11) Law Rep. 3 Ch. 791.

Mr. *C. Hall*, and Mr. *Graham Hastings*, for the official liquidator:—

This being an unregistered company, it is not necessary that a contributory should be a shareholder; for the 200th section of the *Companies Act*, 1862, enacts that "In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves." This surely must include the beneficial owner of the shares held by a trustee. At all events, it will include a case where a man purchases shares in the name of a nominee for the purpose of escaping liability, and of concealing his ownership from his co-adventurers. In all the cases, whether under registered companies or not, it is admitted that if a man transfers shares to a trustee with a fraudulent intent to escape liability, the transfer is void; and there is no distinction made between the case of a shareholder transferring his shares and a stranger purchasing fresh shares, and having them transferred to his nominee: *Ex parte Bugg* (1); *Bunn's Case* (2); *Budd's Case* (3); *Hyam's Case* (4); *Lund's Case* (5); *Chinnock's Case* (6); *Lindley* on Partnership (7).

In the present case, although the order for winding-up was not made till June, 1868, yet the evidence shews that the company was not in a flourishing condition when the shares were purchased, and that a year afterwards it was so embarrassed that steps were taken towards winding it up.

SIR W. M. JAMES, L.J.:—

In Mr. *Lindley's* Treatise on Partnership (8), the law as laid down by the cases to which we have been referred seems to me to be stated correctly; that is to say, "That, notwithstanding there is a complete transfer, the transferor will be held a contributory if the evidence shews not only that the transfer was made to get rid of a liability,

(1) 2 Dr. & Sm. 452. (5) 7 W. R. 333.
(2) 2 D. F. & J. 275. (6) Joh. 714.
(3) 3 Ibid. 297. (7) 2nd Ed. pp. 1311, 1352.
(4) 8 W. R. 52 (8) Ibid. p. 1352.

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but that the transfer was not a real transaction, and was not intended to divest the interest of the transferor, and to render the transferee the *bonâ fide* owner of the shares, but that the transferee held them subject to the orders of the transferor; and although it cannot perhaps be denied that in the cases in question the relation of trustee and *cestui que trust* was created, it is obvious that the sole object of the trust was to screen the transferor from liability. The cases shew that such devices will not have the effect desired by the persons who practise them." That relates entirely to the cases of transfers by persons who are already shareholders, and who as such shareholders have entered into a relation with the company which creates a privity between them, and who are persons liable to contribute to the debts unless they have discharged that liability. The Courts have held that a transaction of this kind, which is a sham, a fraud, produces no effect whatever, and restores the transferor who has resorted to that device to the position in which he was before the device was resorted to. But it appears to me very difficult indeed to apply those cases or the principles to be derived from them to the case of a person who has never been in respect of the shares a shareholder at all, who has never been in any relation with the company, who has simply gone into the market to buy shares, and had bought them in the name of a person whose name has been tendered to and accepted by the company as the shareholder. There no setting aside the transaction as void would put the name of the *cestui que trust* or real owner upon the register, and I do not know upon what ground it is that the Court, setting aside a transaction as fraudulent, is able to make a new contract for persons which they have never made themselves. The only case in which the attempt was made to introduce a person who was not a shareholder, who never had been a shareholder, and who never contracted with the company to be a shareholder, was *Ex parte Bugg* (1), before Vice-Chancellor *Kindersley*, upon which Mr. *Hall* made this comment, that the case was really decided upon the question of fact as to whether there was or was not a fraud in the particular circumstances of that case; assuming that if there had been fraud the *cestui que trust* would have been put on the register as the real owner, who

(1) 2 Dr. & Sm. 452.

had sought to escape liability by purchasing in the name of a person of unsubstantial means. I really cannot see how this Court, under the *Companies Act*, or independently of the *Companies Act*, can in any case have jurisdiction to compel a man to become a partner where he never has himself, either directly or indirectly, entered into a contract with the firm for that purpose. But it appears to me that this particular case is entirely governed by the decision in the case before Vice-Chancellor *Kindersley*, when we consider the facts of the two cases. For what are the circumstances here? This was a company which was to consist by their rules and regulations of the adventurers whose names were originally subscribed, and "all other persons who should become registered adventurers in the company thereby formed." Then there is this provision as to the transfer of shares. [His Lordship read the 14th regulation, and continued:—] Now, the two gentlemen in question, Messrs. *King* and *Cope*, being minded to buy shares, buy them in the name of a person who is called for the purpose of this argument a beggar, who is admitted to be a person of unsubstantial means, at all events not a person at the time likely to be able to pay any very large sum of money for calls. If all the facts had been communicated, if the fact that he was a nominee, that he was a name used by *King* and *Cope* for their own purposes, not intended to be the real owner, had been communicated to the company at the time, but the calls had been paid upon the shares proposed to be transferred to him, and that transfer being accepted by him had been sent by him or by his authority to the secretary, it would have been, as it seems to me, the plain duty of the company, and it would have been the plain ministerial duty of the secretary to have registered that man, and that man only, as the owner of the shares in question. That being so, it is difficult to perceive how there could be any fraud in making and concealing an arrangement from the company, which arrangement, if it had been perfectly known to everybody, it is plain could not have been prevented from being done exactly in the way in which the parties proposed it should be done. Beyond that, I am satisfied upon the evidence that the use of the name here was not for the sole purpose of screening a transferor from liability; but that there was exactly the same kind of honest motive which was discovered in

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Ex parte Bugg (1)—that is to say, there being two gentlemen, one in the committee of management, and one the secretary of the company, who were minded to speculate in shares, but were not desirous when they were selling shares that the fact should be known that they were selling shares of a company in which they occupied these positions, and having a joint speculation in which there might be accounts to be taken in which their rights to particular shares might depend entirely upon the ultimate adjustment of the accounts between them, for their own convenience in dealing with the shares agree that the shares shall not be put in the name of either of them, but in the name of another person which they consider to be "a safe name." To that expression I do not attach the meaning that Mr. *Hall* put upon it—namely, a man safe never to have a farthing to pay for these shares, but a man whom they can safely trust to do what is honest with regard to them.

On these grounds I am of opinion that the Vice-Warden of the Stannaries Court has come to a wrong conclusion in substituting Mr. *King's* name for the name of *Verchild*, or putting Mr. *King's* name at all on the list in respect of these shares. Mr. *Cope* has not appealed to us, and possibly he has no motive for it, because, as between him and the nominal owner, he is bound to indemnify him; and therefore it is a matter of indifference to him whether he is on the list or not. I am of opinion that the Appellant is entitled to succeed upon this appeal to have his name taken off, and to have the £200 which he has paid to the Registrar returned to him.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The Vice-Warden, in determining this case, proceeded on the authority of *Cox's Case* (2), which he thought could not be distinguished from this case. Now I am of opinion that this case can be distinguished from *Cox's Case* in two most material particulars, both as respects what is the mere question of law, and also on the facts. In *Cox's Case, Cox* was one of the original promoters of the company, and he had agreed with the company, or perhaps more strictly with the other promoters,

(1) 2 Dr. & Sm. 452. (2) 33 L. J. (Ch.) 145; 12 W. R. 92.

that he would take a certain number of shares, and then, in collusion with the officers of the company, he procured 200 of these shares to be registered in the names of persons who were, as the Lords Justices found, mere sham names, that is to say, names of persons who had no real interest in the shares; and that he did that, as they also found, for the improper purpose of deceiving other persons who might become shareholders in the company. Now, under these circumstances, what, in substance, the Lords Justices did amounted to granting specific performance of that contract which *Cox* had entered into with the company. In the same way, as respects those numerous cases which have been referred to as to transfers, although it might not be correct to say that the transfer could be treated as absolutely void, because I think that at law it would be a good transfer to the nominal holders, yet I can quite conceive that a Court of Equity may say that a transfer by a shareholder to a mere pauper, for the sole purpose of avoiding liability, is a fraudulent and improper transfer, and ought to be set aside. Then, of course, the transfer being set aside, the former shareholder remains a shareholder, and is a contributory. But I confess I have great difficulty in seeing how, if a person never has been a shareholder, and has never contracted with the company that he would become a shareholder, a Court of Equity has any right to make such person a contributory at all.

The jurisdiction of the Court of Equity is a statutory jurisdiction; and in this particular case of an unregistered company it depends on the 200th section of the *Companies Act*, which provides that, "In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay, or contribute to the payment, of any debt or liability of the company." Now, is Mr. *King* liable to contribute at law or in equity to any debt or liability of the company? He is certainly not liable at law. The creditors of a company of this kind could at law only sue the persons who, with their own consent, were registered in the cost-book as the shareholders at the time the debt was contracted; and I am not aware that the creditors of such a company have any more extensive right in equity than they have at law. If, then, a person simply

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goes into the share market and buys shares from a jobber, and thereby enters into a contract with the jobber that he will either himself become registered or procure somebody else to become the transferee and registered owner of the shares which, not the jobber himself, but some vendor of the jobber, will transfer, and that transfer is completed, and the name of the transferee is registered, can there be any question that the contract which was entered into with the jobber is entirely performed? Then, if that be so, it is the business of the company, by their articles of association, to determine whether they will or will not have any security against persons of no substance becoming shareholders. A large number of companies have regulations by which the directors may reject as shareholders persons they deem not to be solvent. Other companies, like the company now in question, have no such restriction, and allow anybody whomsoever to become a shareholder; and it seems clear, from the regulations of this company, that they do not confine their shareholders to purchasers, but allow mere transferees—persons who may not be purchasers—persons who may be mere nominal owners or mere trustees—to be registered. I cannot therefore see how, if a person who is not a shareholder, and has never entered into any contract with the company, agrees to buy shares and then has them registered in the name of a transferee whom either the company are bound to accept, or whom they do accept, such person can be said to commit any fraud upon the company. It is the fault of the regulations of the company if they admit of persons becoming shareholders who are of no means, and the other shareholders and the creditors of the company must run the chance. Therefore I have great difficulty in seeing how, under any circumstances, *King* could have been made a shareholder and a contributory in this company. But perhaps it is hardly necessary directly to decide that in the present case, because I quite agree with the Lord Justice that even if the rule were such as Mr. *Hall* has contended for, and that a Court of Equity could, in a case where a person has been put in as a nominee for the sole purpose of avoiding liability, make the *cestui que trust* a contributory, it is not made out in this case that there was any such fraudulent intention. It may be perfectly true that *Verchild* was a person who was not able to pay

the amount of the calls if the company should fail, and it is quite conceivable that it may not be very easy to find a nominee of substance who would be willing, for no remuneration at all, to run the risk of being a shareholder in such a company as this. But there is no evidence which convinces me that either *Cope* or *King* had any intention of cheating the other shareholders or the creditors of the company out of any calls that might be made. It appears to me perfectly reconcilable with all the evidence that they knew perfectly well that they would be liable to indemnify *Verchild*, and that they *bonâ fide* intended to indemnify him against any liability he might incur by having the shares registered in his name as their nominee. They had other reasons why they wished not to have them registered in their own names. One was already a manager and a very large shareholder in the company; the other was the secretary of the company; and I can quite conceive that persons in that position, being minded to speculate, would think it might be injurious to the company if the fact of their buying and selling large quantities of shares were made public, and that they would wish to have, as they say, a safe person in whom they could trust, and in whose name they might have their shares registered. I do not see that there was anything improper or fraudulent in such an intention. Therefore, in my opinion, even if a *cestui que trust* could be made a contributory when he puts shares in the name of a nominee for the sole purpose of avoiding liability, no such case is made out upon the facts in the present instance.

The LORD JUSTICE JAMES:—The Appellant will have his costs of the appeal out of the assets. The hearing before the Vice-Warden appears to have been merely formal. This is, in fact, the first hearing.

Solicitors for the Appellants: Messrs. *Childs & Batten.*

Solicitors for the Official Liquidator: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Carlyon & Paull, Truro.*

L. JJ.
1871
Jan. 26, 27.

In re LONDON AND MEDITERRANEAN BANK.
Ex parte AGRA AND MASTERMAN'S BANK.

Company—Liquidators—Acceptance of Bill by one Liquidator—Companies Act, 1862, *s.* 133.

The four liquidators of a company passed a resolution that one of them should have power to accept bills of exchange. They afterwards resolved that bills to the amount of £7500, which had been accepted to the credit of *C.*, should be renewed. Fresh bills were accordingly drawn and accepted by one liquidator:—

Held (affirming the decision of *Stuart*, V.C.), that the acceptances were invalid.

Ex parte Birmingham Banking Company (1) commented on.

Whether, under any circumstances, liquidators can authorize one of their number to sign a bill in their name, *quære*.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, made in the winding up of the *London and Mediterranean Bank, Limited.*

In the year 1865, *Adolph Coqui* opened a credit with the bank for £7500. Under this credit, bills to the amount of £7500, dated the 6th of September, 1865, were accepted by the bank and delivered to *Coqui* to be discounted. The bills were drawn by a Mr. *Bradley* and other persons.

On the 22nd of November, 1865, a resolution was confirmed for winding up the company voluntarily, and four liquidators were appointed. On the 24th of November the four liquidators held a meeting, at which they passed a resolution to the following effect: "That the bankers of the company be requested to honour all cheques and drafts, and orders to pay thereon, bearing the signature of one of the liquidators, manager, or secretary, countersigned by the accountant or one of the cashiers of the company, in lieu of the arrangements formerly subsisting; and that the bank's acceptances be signed by one of the liquidators and by the manager as heretofore."

On the 9th of December the bills for £7500 were renewed at the request of *Coqui*, the fresh bills being accepted by one of

(1) Law Rep. 3 Ch. 651.

the liquidators and the manager, to become due on the 3rd of March.

On the 20th of February, 1866, *Coqui* wrote to Mr. *W. E. Fowler*, the manager of the bank, as follows:—

"On the 3rd of next month the acceptances of your bank for £7500, given in exchange for acceptances of £5000, of Messrs. *Gillespie, Churchill, & Co.*, and £2500 of the *Natal Investment Company*, fall due. I leave town for *Cologne* in a day or two, and I shall feel obliged by your informing me if you will repeat the transaction, so that I may make the necessary arrangements before leaving."

On the 23rd of February the liquidators passed a resolution, which was entered on the minute-book in the following terms: "The renewal of *A. Coqui's* bills for £7500, due on the 3rd of March, was agreed to." On the same day the manager wrote to *Coqui*, as follows:—

"I beg to inform you that, on receiving from you a cheque for £165 9*s.* 10*d.*, the amount of inclosed account, my committee will accede to your request for renewal of the credit, by acceptances for £7500, receiving, as cover for the bills falling due on the 3rd of March, acceptances of Messrs. *Gillespie, Churchill, & Co.* for £5000, and the *Natal Investment Company* for £2500, such credit to be for a period of nine months on the same terms as before, namely, a commission of half per cent."

Accordingly, bills were drawn to the amount of £7500, of which the three bills which are the subject of this appeal formed part. They were for the respective amounts of £1200, £1100, and £800, and were each of them drawn by *A. Coqui*, and accepted "For the *London and Mediterranean Bank*, in liquidation. *W. Maxwell*, liquidator; *W. E. Fowler*, manager." They were indorsed by *Coqui* to Messrs. *Gillespie & Churchill*, and were now held by the *Agra and Masterman's Bank*. The liquidators had been changed since the bills were accepted, and the present liquidators disputed the claim of the holders of the bills to prove against the *London and Mediterranean Bank*. The claim was disallowed by the Vice-Chancellor, who considered that the acceptances were void, not having been signed by two liquidators in accordance with the

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Ex parte AGRA AND MASTERMAN'S BANK.

Companies Act, 1862, on the authority of *Ex parte Birmingham Banking Company* (1), which was decided in the winding up of the same company. From this decision the *Agra and Masterman's Bank* appealed.

Mr. *Fry*, Q.C., and Mr. *Westlake*, for the Appellants:—

The case of *Ex parte Birmingham Banking Company* does not conclude this case. The present Lord Chancellor there said (2): "I am disposed to accede to the very able argument of Mr. *Swanston* and Mr. *Lindley*, and I am not at all inclined to dispute their proposition, that the authority of the two does not necessarily mean that you should find the names of the two liquidators on the piece of paper which forms the bill. But though the liquidators might well meet (the four liquidators are said to have done so here) and give an authority to some one, yet that must be as to the acceptance of a specific bill, or other specific thing which is to be done; and they may then say that their clerk or agent, whoever it may be, shall sign for them. . . . . That may be a good acceptance under the 95th section; but at least you must have the judgment of the two liquidators upon the particular bill." That is just what in effect took place; for, reading the resolution of the four liquidators with the letter of *Coqui* asking for a renewal, and Mr. *Fowler's* reply, it is clear that the liquidators passed their judgment that these particular bills should be accepted. The act of the single liquidator was therefore merely ministerial.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the official liquidators:—

The observations of the present Lord Chancellor in *Ex parte Birmingham Banking Company* were merely *obiter dicta;* but they do not really apply to the present case, for bills to a large amount were to be renewed, and the amounts and dates of the renewed bills were not settled by the resolution of the 23rd of February, 1866, but were left to the discretion of the persons who might sign the acceptances. There was a very similar resolution in *Ex parte Birmingham Banking Company*, but that was not considered sufficient (3). If the bills are invalid, the holders

(1) Law Rep. 3 Ch. 651.
(2) Ibid. 653.
(3) This resolution, which does not appear in the printed report, was passed

cannot claim for the amount on any other ground: *Bolognesi's Case* (1).

Mr. *Fry*, in reply.

SIR W. M. JAMES, L.J.:—

Now that we have the resolution before us upon which the judgment of the Lords Justices proceeded in the case of *Ex parte Birmingham Banking Company* (2), I am unable really to make any substantial distinction between that case and this. In that case there was, in the first place, the same authority given to one liquidator to accept bills, with the concurrence of the manager, and there was also a resolution which is in substance the same as that which occurs in this case—a resolution for the renewal of existing bills to the extent of £16,500 upon certain terms. In that case the present Lord Chancellor, then Lord Justice, said (3): "The grant of a sweeping authority to issue bills, altogether to the extent of £16,500, without any judgment exercised as to the date at which they are to be issued, the proportions in which they are to be issued, the amount of the bills, or the times during which they shall run, except this, that there are to be three months from the date, whenever that may be, does not appear to us an act which it was competent to the four liquidators to do in the manner proposed by their resolution." Every word of that seems to me to apply to this case, unless, indeed, Mr. *Fry* could make out that the bargain was for a renewal of each specific bill which was outstanding, at its becoming due, by another bill at the same date, and therefore that everything was provided for by the resolution and the agreement. But to arrive at that conclusion, I have no data different from those existing in the case of the *Birmingham Banking Company*. When I read the letter of the 23rd of February from Mr. *Fowler* to Mr. *Coqui*, I

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on the 27th of March, 1866, and was entered in the minute-book as follows: "Mr. *Dimsdale* having attended and given explanations, it was resolved, without prejudice, that the bills now about maturing shall be renewed for a period of three months, and that upon such renewed bills becoming due they shall be renewed to the extent of one-half for a like period of three months."

(1) Law Rep. 5 Ch. 567.
(2) Ibid. 3 Ch. 651.
(3) Ibid. 654.

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can see nothing in it which amounts to a statement that the renewal was to be exactly *modo et formâ*. The bills falling due upon the 3rd of March were to be provided for, and there was not to be a renewal of those particular bills, but a renewal of that particular amount of credit. It was quite open to *Coqui*, as it seems to me, to have produced any bills for any amount he liked, provided that the whole did not amount to more than £7500, which was the real substance of the transaction. I cannot, therefore, distinguish the £7500 in this case from the £16,500, as to which there has been a positive decision of the Lords Justices, that it was not within the competency of one liquidator to accept the bills as being a mere ministerial act. It is also to be observed that there was no actual decision of the Court that the act of one liquidator under any circumstances would be sufficient. It was not necessary to decide the point in that case. I must confess I do not consider it is a decision that the acceptance of the bills can be delegated to one liquidator when the Act of Parliament says that the thing ought to be done by the two. I desire not to preclude myself from expressing an opinion on that point whenever it shall arise. It appears to me strange that where the Act of Parliament provides that a bill of exchange can be accepted by two on behalf of another person, or a body of persons, anything short of the act being done by two persons will suffice.

Sir G. Mellish, L.J.:—

I am also of opinion that this case cannot be distinguished from the rule laid down in the case of the *Birmingham Banking Company* (1). Taking the 133rd and the 95th sections of the Act of 1862 together, two liquidators have power to accept bills of exchange on behalf of the company; and the question is, are the bills of exchange in question accepted by two liquidators? Now, equally with the Lord Justice, I have considerable doubt whether two liquidators can be considered in any case to have accepted bills on behalf of the company, unless both have signed them. But I will assume, in accordance with what is thrown out by the Lord Chancellor, in the case of the *Birmingham Banking Company*, that although they may certainly not delegate their discretion, yet if

(1) Law Rep. 3 Ch. 651.

they determine that certain specific bills shall be accepted, they may delegate to one of their number the power of actually signing his name for theirs. Well, then, have they done so in this case? Now, I am clearly of opinion that they have not. The whole body of liquidators made an agreement with *Coqui*, that on his performing certain conditions, namely, handing over other bills to the amount of £7500, so as to pay the bills then running, his credit should be renewed. That seems to me to be the substance of the bargain they made; that is to say, he could have power to draw bills to the amount of £7500 at three month's date. These bills, purporting to be drawn under the agreement, are brought in to be accepted. It appears to me that the person who is to accept on behalf of the company has a considerable discretion to perform. In the first place, he has to see whether *Coqui* has performed that which was the condition precedent, and whether he has handed over the bills. That alone is a considerable discretion. Then the specific bills are not pointed out. The exact date is certainly not pointed out, although I think they would, no doubt, have to be drawn within a reasonable time from the day when the bargain was made. Nor are the specific amounts pointed out. Therefore the resolution did not give a mere authority to accept certain specific bills, but it delegated, as it appears to me, to a single liquidator that discretion which, by the Act of Parliament, was to be exercised by the two. The appeal will be dismissed with costs.

Solicitors for the Appellants: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Official Liquidators: Messrs. *Lewis, Munns, & Co.*

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JOHNSTON'S CLAIM.

Remoteness of Damage — Deposit for safe Custody with Bankers —Negligence— Forged Transfer—Costs in Suit to recover Certificates.

J., the owner of railway shares in two companies, deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving the certificates from the railway companies, *J.* gave his address in one instance at the office of the bank, and in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of *J.* to the transfer. The companies wrote to *J.*, informing him of the transfers, and receiving, in one instance, no answer, and in another an answer in *J.'s* name forged by the manager, registered the transfer. *J.* afterwards, on discovery of the fraud, brought suits against the two companies and the transferees of the shares, in which he recovered the shares, but the Court gave him no costs. The banking company being wound up, *J.* claimed to prove against the company for the amount of his costs in the suits which had been occasioned by their negligence:—

Held (affirming the judgment of the Master of the Rolls), that the banking company were bailees for reward of the certificates, and that they had been guilty of culpable negligence in keeping them; but *held* (reversing the order of the Master of the Rolls), that the loss of the costs was too remote a consequence of the negligence of the company for them to be held liable for it, and the claim refused.

THIS was an appeal from a decision of the Master of the Rolls refusing to admit a claim by Mr. *William Johnston* against the *United Service Company, Limited*, in respect of certain costs incurred by him in the suits of *Johnston* v. *Renton* and *Johnston* v. *Parsey* (1).

The facts which led to those suits are fully detailed in the report. They may be stated shortly as follows:—

The *United Service Company* carried on business as bankers and army agents at 9, *Waterloo Place*, Mr. *George Edward Hudson* being their manager.

The claimant, *W. Johnston*, who usually resided at *Stonehaven*, in the county of *Kincardine*, in September, 1865, deposited with the company, with whom he had a banking account, the certificates of twenty-five paid-up shares of the *Metropolitan District Railway*

(1) Law Rep. 9 Eq. 181.

Company for safe custody, and took the receipt for them from *Hudson*. The company was to receive the dividends and to charge a small commission for doing so.

On the 25th of September, 1865, the shares were converted into stock, and the certificate for £500 stock was handed to the claimant, who gave his address at 9, *Waterloo Place*, which he said was the address of his agent, *G. E. Hudson*, who had the custody of the share certificates. On the 12th of November, 1867, the claimant gave the stock certificate to *Hudson* for safe custody.

In June, 1868, *Hudson* fraudulently sold the stock to *James Renton*. The transfer deed was sent to *Hudson*, who forged *Johnston's* name to it. On the 3rd of July the forged transfer and the stock certificates were forwarded by *Hudson* to the railway company, whose registrar addressed the usual notice to the claimant at 9, *Waterloo Place*, informing him that the transfer had been left at the office for registration. No answer was returned to this notice, and the new stock certificate was accordingly issued to *Renton*.

On the 11th of June, 1868, *Johnston* in like manner deposited a certificate for £200 stock of the *London and South Western Railway Company* with the *United Service Company* for safe custody. On obtaining the certificate from the railway company, he gave his address at the *East India United Service Club*. In the same month *Hudson* sold this stock to *William Parsey*, and forged *Johnston's* name to the transfer. The treasurer of the railway company sent the usual notice of the transfer to *Johnston* at the *East India United Service Club*, with a request that, if the transfer was correct, he would sign his name and return it. *Hudson* obtained possession of this notice and forged *Johnston's* name to it, and returned it to the railway company, and the new certificate was accordingly issued to *Parsey*.

The *United Service Company* was afterwards ordered to be wound up, and in November, 1868, *Hudson* absconded, and the claimant then discovered the fact of the forgeries. He accordingly filed the bills in the suits of *Johnston* v. *Renton* and *Johnston* v. *Parsey* (1) against the holders of the stock certificates, and the two railway companies which had issued them, praying that the transfers might be declared void and new certificates issued to him.

(1) Law Rep. 9 Eq. 181.

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Vice-Chancellor *James*, before whom the suits were heard, granted the relief prayed, but gave the Plaintiff no costs of the suit, being of opinion that the Plaintiff had contributed to the result by his own negligence.

Johnston accordingly brought in the present claim against the *United Service Company* for the amount of his costs in the two suits, contending that the suits were rendered necessary by the negligence of the bank.

It appeared from the evidence that the *United Service Company* kept the securities deposited with them for safe custody, as well as their own securities, in a strong box in the manager's room, of which he kept the key. The directors had passed a resolution that the securities intrusted to them should be deposited with the *Bank of England*, but that resolution did not appear to have been acted upon. No record was kept of the securities in their custody; for, although a book had been provided for that purpose, it had been disused by *Hudson* with the assent of the directors.

Under these circumstances the Master of the Rolls allowed the claim, being of opinion that the company were bailees for reward; that they had been guilty of negligence in allowing *Hudson* to have unrestricted control over the securities, which had been the cause of the costs incurred by the claimant; and that the company could not be heard to say that the claimant had also been guilty of negligence in trusting their manager. From this decision the official liquidator appealed.

Mr. *Roxburgh*, Q.C., Mr. *Lindley*, and Mr. *Graham Hastings*, for the Appellant:—

The company were merely gratuitous bailees; the securities were deposited with them simply for safe custody, and not for their benefit in any way. The small commission which they retained was for receiving the dividends, not for taking care of the securities. They were therefore only bound to take such reasonable care as they did of their own property: *Giblin* v. *McMullen* (1); *Finucane* v. *Small* (2). They did take this reasonable care. *Hudson* was the proper person to keep the key of the safe, and his dishonesty was a contingency against which they were not bound

(1) Law Rep. 2 P. C. 317. (2) 1 Esp. 315.

(3) See W.N. (1870) 240.

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to provide. Besides, *Johnston's* loss was caused in great measure by his own negligence: he trusted *Hudson*, and gave an address, which enabled him to commit the fraud. But, even supposing the company to have been guilty of culpable negligence, the damage sustained by *Johnston* in the costs of the suit is too remote to be laid upon the company. That negligence was only one of a series of events which led to the loss of the costs; and it is clear that the costs were refused partly on the ground of his own conduct.

Mr. *Southgate*, Q.C., and Mr. *Chitty*, for the claimant:—

The deposit of securities is very different from the deposit of a box, as in *Giblin* v. *McMullen* (1), where the customer himself had the key, and could examine the securities for himself. Here the company had the sole charge of the securities; they were deposited with them in their ordinary business as bankers, and they had a lien on them in that capacity: *Brandao* v. *Barnett* (2). They had also a commission for receiving the dividends: they were therefore bailees for reward. But, even if they were gratuitous bailees, they had been guilty of such gross negligence as to render them liable: *Doorman* v. *Jenkins* (3); and they cannot be heard to complain of *Johnston* for contributory negligence in trusting them or their agent. The loss of the costs is not too remote. It followed as a necessary consequence from the negligence of the company: *Davis* v. *Garrett* (4); *Collen* v. *Wright* (5); *Cottam* v. *Eastern Counties Railway Company* (6).

Mr. *Roxburgh*, in reply.

At the conclusion of the arguments, the Lord Justice *James* said that, before giving judgment, he would consult with Lord Justice *Mellish*, who had been unable to attend.

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Jan. 31. SIR W. M. JAMES, L.J.:—

This claim was heard upon appeal before me, sitting alone during the unavoidable absence of the Lord Justice. But when

(1) Law Rep. 2 P. C. 317.
(2) 12 Cl. & F. 787.
(3) 2 Ad. & E. 256.
(4) 6 Bing. 716.
(5) 8 E. & B. 647.
(6) 1 J. & H. 243.

4 Jur. N.S. 358
6 Jur. N.S. 1867

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it was argued I stated to the counsel that I should request the Lord Justice to read the papers, and that I should consult with and be advised by him, communicating to him as faithfully as I could the several points which had been raised and argued before me. It is after such consultation and such advice that I am about to state the conclusion at which we have arrived.

The material facts of the litigation out of which this claim arises are stated in the report of two cases heard before myself as Vice-Chancellor, of *Johnston* v. *Renton* and *Johnston* v. *Parsey* (1). The counsel on both sides agreed that that report should be taken as containing an accurate statement of the facts as far as they appeared in those suits. It will not be necessary for me, therefore, further to refer to them, except to say that they were suits for the restoration of shares belonging to the Plaintiff, the present claimant, of which he had been deprived at the time by means of a forged transfer of his shares and stock, the certificates of which had been lodged by him with a bank called the *United Service Company, Limited*, and in which proceedings he recovered, in fact, his shares, but did not recover, and was not allowed, the costs of the suit.

The company being afterwards wound up, the Plaintiff in those suits took in a claim before the Master of the Rolls for those costs, as damages which had been occasioned to him by the negligence of his bailees, the *United Service Company*. The material facts on which that claim arises may be shortly stated thus: The company were his bankers, he had deposited with them the certificates in question, together with other documents of like character, some with coupons and some without. The bank, in consideration of a very small commission, undertook his banking account, and were authorized to receive the dividends on those shares, and to collect the coupons as and when they became due. It further appeared that the bank had passed a resolution for the safe custody of their customers' securities, by a provision that they should be deposited with the *Bank of England*, a resolution which was utterly impracticable and impossible, having regard to the nature of banking business. The resolution having failed, as it necessarily must have failed, no further provision whatever was made by the bank or the directors for the safe custody of the securities of their

(1) Law Rep. 9 Eq. 181.

customers or of their own. In truth, it appears that without any control, without any care, without any supervision whatever, they fell into the power of the manager, who used these shares, as he seems to have used other securities belonging to the bank, for his own purpose, and forged the transfer, which was the subject of the litigation before me.

Under these circumstances, the Master of the Rolls was of opinion that the bankers were bailees for reward, and that there was sufficient negligence in the performance of their duty as such bailees to render them liable for the consequences of that negligence. In both these conclusions we concur. We are of opinion that this case, on the first point, is entirely distinguishable from the case of *Giblin* v. *McMullen* (1), where a box containing documents was placed at a bank simply for the purpose of convenient deposit, and the customer alone had access to it for the purpose of placing or removing anything he pleased. In this case, although it is true that the possession of these particular documents was not essential to the collection of the moneys which the bank were authorized to collect, it appears to us that they came into their custody in the ordinary course of their business as bankers, that they were deposited with the bank by a customer of the bank, and that such deposit was made under such circumstances as would have entitled the bank to a lien upon them for their general banking account. These considerations appear sufficient to dispose of the first point.

We are further of opinion, that the negligence of the bank is proved; that leaving the securities of the customers in the way in which they were left, in the uncontrolled and unwatched power of the manager, Mr. *Hudson*, was a gross neglect, and is not excusable or justifiable by reason of the fact that they were equally negligent with regard to their own documents and their own securities.

But there remains a third point; and that is, whether the loss of those costs which the Plaintiff failed to recover in the proceedings before me is a natural, necessary, or ordinary consequence of that neglect. And with regard to that question, we have not arrived at the same conclusion as the Master of the Rolls. It is not every loss

(1) Law Rep. 2 P. C. 317.

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that indirectly follows from the neglect of a bailee with which the bailee can be charged. For instance, if in this case the suit had been in the form of an action of detinue, or a suit in the nature of detinue, for the restoration of the certificates themselves which had fallen into the hands of a wrong-doer or of an innocent holder under a wrong-doer, we should have been of opinion they would have been the natural and necessary expenses incurred by the owner in recovering his own property. But the suit here was a suit not for the restoration of the certificates, but it was a suit for the rectification of the railway company's books, to enable the owner to be registered for the enforcement of his right to receive the dividends on the shares, and to be treated as the owner of those shares; and the *causa causans* of that litigation was beyond all question the forgery which was effected by *Hudson*, and which led to the subsequent proceedings. Now, the possession of the certificates, through the negligence of the bank, was one of the means, and one only, of the means by which that result was effected; and it appears scarcely possible to hold that that result ought to be considered as one of the consequences which any bailor could expect the bailee to provide against when he undertook the safe custody of the certificates. Suppose the bailee of a key carelessly allowed the key to fall into the possession of a man who committed a burglary, and by means of that key opened a box which contained valuable property. It is scarcely possible to hold that the negligence of the bailee with regard to the key would be followed by responsibility for the loss of every article obtained by the burglar through the instrumentality of the key. I do not think the claimant in this case could have successfully maintained an action at law—and this claim is of the same nature as an action at law—unless, after averring the negligence and the loss, he could have gone on to aver that he had subsequently been obliged to bring a suit in the Court of Chancery for the rectification of the register and the restoration of his shares, and that by the course and practice of the Court he would have received the costs of those proceedings had it not been for the fact of the certificates having fallen into the hands of *Hudson*, or something to that effect. If the possession of the certificates by *Hudson* had been made out to be the sole or substantial ground

on which the claimant was deprived of his costs, possibly he might have succeeded in such an action. But it is impossible to read the report of the cases of *Johnston* v. *Renton* and *Johnston* v. *Parsey* (1) without seeing that there was a great deal more in the case than the loss of the documents which led to that result. Each of the parties claiming the shares under the forged transfer in fact argued, and argued with considerable force, that he ought not to have been a party to the litigation at all. Each of them said: "If you want your certificates from the company who have got them, file your bill against the company alone; why do you drag us here?" And, further, it appears that one of the grounds upon which the railway company escaped the costs was, that the railway company had taken the precaution in each case of sending a letter directed to *Johnston*, informing him of the fact that the transfer had been presented to them for registration. One letter, it is true, was sent to the bank, but not sent to the bank *quâ* bank. For it appears from the report of the case, that it was directed to be sent to No. 9, *Waterloo Place*, the claimant having "informed the company's assistant registrar that such address was quite correct, as it was the address of his agent, *George Edward Hudson*, who had had the custody of the share certificates, and had also the receipt of the company in exchange for them, which receipt he (*Hudson*) had lost." It appears impossible to say that the company had ever undertaken any duty with regard to that letter. It was in consequence of the neglect to answer that letter that the company was induced to register the transfer. Another letter was addressed to the club of the claimant, and there the matter was carried a step farther, for the letter being sent to the club, by some means *Hudson* obtained possession of the letter, and wrote a forged answer to it in the name of the claimant, by which the company were told it was all right, and they could proceed.

Under these circumstances, it appears to me, with the advice and assistance of the Lord Justice, impossible to hold that the failure to recover those costs, or the failure to recover any ascertainable or separable portion of those costs, can be said to have followed naturally and directly as a consequence of the

(1) Law Rep. 9 Eq. 181.

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neglect of the company; and that being so, we are of opinion the order of the Master of the Rolls should be discharged; but, of course, under the circumstances of the case, without any costs either here or in the Court below. The official liquidator will take his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Deane & Chubb.*
Solicitors for Mr. *Johnston:* Messrs. *Peacock & Goddard.*

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HEINRICH *v.* SUTTON.

Practice—Trustee—Right to defend by separate Solicitor—Authority to enter Appearance—Banking Company.

The deed of settlement of a banking company contained a proviso that, where property was vested in trustees, the court of directors should have power to direct any actions or suits to be commenced, prosecuted, or defended, on account of the property of the bank, and to direct the necessary parties to such actions or suits to carry them on or defend them, and that such parties should be indemnified out of the funds of the bank.

H., in whom property was vested as one of the trustees of the bank, and who had executed the deed, was made co-Defendant, with two other trustees, in a suit by persons claiming the property adversely to the bank. The solicitors of the bank entered an appearance for *H.* without his knowledge:—

Held, (affirming the decision of *Malins*, V.C.), on a motion by *H.* to expunge the appearance as irregular, that the provision in the deed of settlement operated as an authority to the bank to use the names of their trustees in any action or suit, and that the solicitor of the bank was entitled to enter an appearance for *H.*, and conduct the defence for him.

But, *semble*, a trustee, under those circumstances, would be entitled to the costs of independent advice for his own security, if he required it, in putting in an answer or affidavit in the suit.

THIS was a renewal of an application which had been made to Vice-Chancellor *Malins*, by Mr. *F. B. Henshaw*, one of the Defendants in the above suit, and refused by the Vice-Chancellor.

By an indenture dated the 27th of April, 1861, certain premises in *Old Broad Street, London*, were conveyed to the Defendants, *P. Sutton, F. B. Henshaw*, and *O. Ommaney*, in fee.

The conveyance was made to the Defendants on behalf of the *National Bank*, of which they were at that time trustees.

The bill was filed by persons claiming a beneficial interest in the property, and prayed that the conveyance might be set aside as a breach of trust, and that the Defendants might reconvey the property and pay the costs of the suit. Nothing appeared upon the face of the deed or of the bill to shew that the Defendants were trustees for the bank, or that the bank was in any way interested in the property.

The solicitors for the bank entered an appearance on behalf of all three Defendants, and prepared answers for them. The Defendant, *F. B. Henshaw*, refused to swear to the answer, asserting that an appearance had been entered for him without his knowledge or consent, and that he wished to appear by his own solicitor. He accordingly moved, before the Vice-Chancellor, that the appearance in his name might be expunged or varied, as having been entered without his authority, and that the solicitors of the bank might pay the costs as between solicitor and client, and indemnify him against all costs occasioned by the appearance.

The *National Bank* was formed in the year 1835 under the 7 Geo. 4, c. 46. They were empowered to sue and be sued by their public officer, but their property was vested in trustees. The deed of settlement, dated the 6th of January, 1835, contained the usual powers for appointing and removing trustees and vesting the property in them, and for transferring it on their removal or resignation. By the 124th clause, it was provided that, "It shall be lawful for the court of directors, at their discretion, to order or direct any action, suit, process, or other proceeding, whether civil or criminal, to be brought, commenced, carried on, prosecuted, or defended, for or on account of the funds or property of the society, or for or on account of any contract or engagement for or on behalf of the society, or for or on account of any other cause, matter, or thing concerning the rights or interests of the society; and also to order or direct the necessary party or parties to such action, suit, process, or other proceeding, whether civil or criminal, to bring, commence, carry on, prosecute, or defend the same, and also to order or direct such necessary party or parties afterwards to stay, compromise, or compound any such action, suit, process, or other proceedings that may be brought, commenced, carried on, or prosecuted or defended in any civil

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matter; and also to order or direct such necessary party or parties to refer such dispute or difference to arbitration. And such necessary party or parties to any such action, suit, process, or other proceeding in any civil matter, shall not release or voluntarily discontinue or become non-suit in the same without the consent of the court of directors, and shall be indemnified out of the funds or property of the society against all expenses or costs which he or they may incur or sustain in consequence of any such action, suit, process, or other proceeding, whether civil or criminal."

The Defendant *Henshaw* was a director and trustee of the bank at the time of the conveyance of the 27th of April, 1861, and had executed the deed of settlement as a proprietor of shares, but he had subsequently retired from the directorship and resigned his office as trustee, which he had power to do under the settlement. The property in question had not, however, been reconveyed by him.

Under these circumstances the Vice-Chancellor refused the motion, considering that *Henshaw* was bound by contract to allow the directors to cause an appearance to be entered in his name; and *Henshaw* appealed from that decision.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the Appellant:—

Every party to a suit is entitled to appear by his own solicitor. If he improperly or unnecessarily severs from persons in the same interest, he is liable to pay his own costs, but his right to appear separately is unquestioned. In the present case this right is not interfered with by the 124th clause in the deed of settlement. It might, indeed, affect the costs of our client if he appeared separately without cause, but it did not operate as an authority to use his name. This bill prays personal relief against the Defendants, and the indemnity of the bank may not be sufficient for his security. Process of attachment may issue against the Defendant without his knowing anything about it, and he may be called upon to swear answers which are untrue or prejudicial to his interests. The Court has always been strict against proceedings being taken in the names of persons without due authority: *Allen* v. *Bone* (1); *Reade* v. *Sparkes* (2); *Crossley* v. *Crowther* (3). We could not move

(1) 4 Beav. 493. (2) 1 Moll. 8. (3) 9 Hare, 384.

simply to change the solicitor, because by so doing we should have admitted the previous retainer of the bank solicitor: *Braithwaite's* Record and Writs Practice (1).

Mr. *Cotton*, Q.C., and Mr. *Marten*, for the bank, were not called on.

SIR W. M. JAMES, L.J. :—

I am of opinion that the order of the Vice-Chancellor is substantially and in form right. It is an application by a Defendant to have an appearance expunged or varied, an application which could not be made without the consent of the Plaintiff, but which it is said that the Plaintiff is willing to facilitate. If that be so, it is not a circumstance favourable to the Defendant's case, considering that he is trustee for a bank against which the Plaintiff is taking hostile proceedings.

The Defendant complains that an appearance was entered by the solicitors of the bank without his authority, and asks for an order consequential upon that complaint. Now, was this done really and in truth and substance without his authority? I am of opinion that it was not. This gentleman was one of the trustees of the bank. The bank property was conveyed to him as one of such trustees upon trust for the bank, and for no other purpose. He had no interest or property in it whatever except as trustee, and was bound to deal with it according to the directions of the managing body for the time being of the society. The bank had their solicitors, and by one of the clauses of the deed of settlement, which is by no means an uncommon clause, it is specially provided that all actions and suits whatever by or against the bank—for that is the substance of the provision—shall be conducted by the bank itself, and, of course, through the bank's solicitors; and that every person connected with the bank, whether he be director, officer, or trustee, shall allow the suit to be so conducted. That being so, and this being a suit relating exclusively to property of the bank, with which this gentleman has nothing whatever to do, except as representing the interests of the bank, the solicitors, acting according to what I conceive to be the universal practice in

(1) Pages 323, 324.

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such cases, enter an appearance for nominal Defendants representing the bank, just as they would for the public officer of the bank, if the public officer had been sued. I cannot accede to the argument that the entry of this appearance was to any extent wrong or improper, or that anything was done by the solicitors which they were not authorized in doing under the provisions of the deed of settlement. The appearance having been rightly entered, the whole of the motion seems to me to fail, because it is simply to discharge or vary that appearance.

But the Defendant says: "It is not right that my defence to the suit should be conducted by a solicitor in whom I have no confidence." If the Defendant had any real interest in the defence of the suit he would be quite justified in saying this; but it is not his defence; it is the defence of the bank, conducted in his name, under an authority given by him. If he is called upon to put in an answer, or to make any personal statement upon oath or otherwise, he has of course a right to exercise his own judgment upon it, and he is entitled to require such advice as he may think necessary, independently of the advisers of the bank. But that has been conceded to him. The answer has been sent to him, and any expense he might incur would be part of the charges and expenses incurred by him as a trustee in the execution of his trust.

It appears, then, to me that the Defendant has no ground of complaint as to anything that has been done in this case, and that he will have no ground to complain unless the solicitors should refuse—although we cannot anticipate anything of that kind—to accede to any reasonable request as to putting in a separate answer for himself. But it would be a monstrous inconvenience if a bank, having to defend a suit of this kind, were not to be at liberty to have it conducted by their own legal advisers, but were obliged to have it conducted by several solicitors, each appearing for a different trustee, and each taking his own views and his own line of defence. It appears to me that this was the very thing which the stipulations of this deed were intended to avoid, and that this gentleman, being bound by them, is clearly in the same position as if he had executed a power of attorney authorizing the bank to name his solicitor.

I am of opinion, therefore, that the Vice-Chancellor's decision was quite right, and that this appeal should be refused with costs.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. The question appears to me entirely to turn on the effect of the deed of settlement of the bank. The bank is not a corporation, but it is formed under the original banking Act, and is entitled to sue and be sued in the name of its public officer. Now a bank of that kind cannot vest its property in its public officer, and, of course, not being a corporation, cannot vest property in itself. It must necessarily vest all its property in trustees. Accordingly, a deed of settlement of this kind usually provides that there shall be trustees; but the trustees are merely persons who, in every respect, are to act under the directions and control of the board of directors, and the management of the affairs of the bank is in the board of directors.

[His Lordship then referred to the clause of the deed of settlement relating to trustees, and to the 124th clause set forth above, and continued:—]

It appears to me perfectly plain that the real meaning of this deed is, that the trustees are to be simply persons into whose names the trust funds are to be transferred, and who may either have to bring actions, or may have actions brought against them respecting that which is the property of the bank; but the bringing and defending of all such actions in the names of the trustees is to be done by the bank, and the bank is to indemnify the trustee or any other person whose name is so used out of the funds and property of the bank. Now, it is admitted that this is a suit brought exclusively respecting the funds and property of the bank. I am of opinion, therefore, that the ordinary solicitors of the company were perfectly entitled to use this gentleman's name for the purpose of entering an appearance and conducting the defence. No doubt, when he is required to do something personally, such as to put in an answer or make an affidavit, he is entitled to be properly advised, so that he may say nothing which is untrue or which is improper for him to say; but, beyond that, it appears to me it is the express provision of the deed that the defence is to be conducted by the bank alone. I think we should be doing very great harm if, in the case of a gentleman who is a trustee or director, and then unfortunately afterwards, as it happened in this case, quarrels with the directors of the company, we were to allow him to take upon himself in any respect the conduct

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of the defence, which is the defence of the bank, and take it out of the hands of the directors. I at first thought he would be entitled at any rate to an indemnity; and if there was any suspicion respecting the solvency of the bank, or if the suits involved such serious liabilities that a trustee ought not to be obliged to run the risk, I can conceive that in such a case a trustee might be entitled to an indemnity; but as long as the funds and property of the bank are perfectly sufficient, I cannot doubt that he has a remedy both at law and in equity, in case he is damnified in any respect by this suit. Probably, under the 124th clause, he might bring an action for an indemnity against the bank in the name of the public officer, or at any rate he might file a bill in this Court for the purpose of being indemnified out of the funds and property of the bank. Therefore I agree that the appeal should be dismissed with costs.

Solicitors for the Appellant: Messrs. *Tathams, Curling, & Co.*
Solicitors for the Bank: Messrs. *W. Tatham & Son.*

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21 Ch D 298

In re STRICKLAND, A PERSON OF UNSOUND MIND.

Lunacy—Charity—Subscriptions.

A lunatic was tenant for life of about seventy houses in *London*, all situate in the same neighbourhood, and producing a gross rental of £2440. His surplus income, after providing him with every comfort, was about £900 a year. Three of the houses were sold to a church building committee as a site for a church to a new district parish, and the incumbent and the church committee solicited subscriptions for building the church and parochial schools in connection with it. Leave was given to the committee of the estate, who was also heiress-at-law and sole next of kin, to contribute out of the lunatic's income £250 towards building the church, and a like sum for the schools.

THIS was a Petition by the committee for leave to give a contribution out of the income of the lunatic's estate towards the building of a church and schools.

The lunatic, who was found such in 1858, was tenant for life of an estate in *Middlesex*, consisting of upwards of seventy houses situate in *Red Lion Square, Fisher Street, Theobald's Road, North Street, Red Lion Street, Princes Street, Kingsgate Street, Lamb's Conduit Passage, Holborn*, and *Gregory's Court, Holborn*, being in the parishes of *St. Andrew, Holborn, St. George the Martyr*, and *St. George, Bloomsbury*. The gross rental was about £2440, but

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the property was subject to a life annuity of £400 a year, and to a charge of £4000, bearing interest at £4 per cent. The lunatic had also some other property, and his total income, after payment of annuities and interest on charges, was about £2656, subject to deduction for lunacy percentage and incidental expenses. An allowance of £900 a year was made for the lunatic's maintenance, and it appeared that his comfort could not be increased by any addition to it. There was therefore in each year a considerable surplus income, which had been accumulated in Court, the savings for 1870 amounting to about £900. The Petitioner was the lunatic's heiress-at-law and sole next of kin, and committee both of his person and estates.

A committee had been formed for building a church in a new district parish, to be taken out of the above three parishes, and with the sanction of the Lords Justices, two of the above-mentioned houses in *Red Lion Square* and one of those in *Fisher Street* had been sold to them as a site for the church. This purchase had not yet been completed, but the church committee paid interest on the purchase-money to an amount exceeding the previous rental of the three houses, and a speedy completion was expected. The incumbent and church committee were also endeavouring to provide schools for the new district, and applied to the Petitioner, as representing the estate, to contribute towards the building of the church and schools. The Master in Lunacy approved of the object, as a church and schools were urgently wanted in the neighbourhood, but he considered that he had not power to direct any such payment.

This Petition accordingly was presented, asking for liberty to contribute out of the lunatic's income £250 towards the building of the church and a like sum towards the building of the schools, and that those sums and the costs of the Petition might be allowed the Petitioner in passing her accounts.

Mr. *Nalder*, for the Petitioner, referred to the observations of Lord *Rosslyn* in *Oxenden* v. *Lord Compton* (1), and of Lord *Eldon* in *Ex parte Whitbread* (2).

THEIR LORDSHIPS made the order.

Solicitors: Messrs. *Coverdale & Co.*

(1) 2 Ves. 69, 73. (2) 2 Mer. 99.

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BAYSPOOLE *v.* COLLINS.

Voluntary Settlement—13 *Eliz. c.* 5—27 *Eliz. c.* 4—*Consideration.*

The owner of a freehold estate, which was worth, beyond a mortgage to which it was subject, about £1300, was persuaded by *K.*, a relative of his wife, to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, *K.* agreed to advance him £150 on his promissory note to meet the interest on the mortgage, which was then in arrear. The settlement was accordingly prepared and executed, but no mention was made in it of the advance of £150:—

Held, on a bill filed by a subsequent mortgagee to establish priority over the settlement, that the advance of the £150 was a sufficient valuable consideration to support the settlement under 27 Eliz. c. 4.

The decision of *James*, V.C., affirmed.

THIS was an appeal from a decree of Vice-Chancellor *James*.

The bill was filed by a puisne incumbrancer, praying a declaration that a settlement of the 21st of August, 1867, was a voluntary settlement of the premises therein comprised, and that the same was superseded by the Plaintiff's mortgage of the 30th of January, 1869, so far as was required to give the Plaintiff the full benefit of his security.

Abraham Culy, a market gardener, being seised in fee of land, part of which was charged with an annuity in favour of *Sarah Andrews*, in the year 1864 executed a mortgage of the property to the Defendants *James Collins* and *G. D. Collins*, to secure the repayment of £2200 and interest.

On the 21st of August, 1867, *Culy*, who had been for some time married, executed a post-nuptial settlement of the property comprised in the mortgage, by which, after reciting that in consequence of the natural love and affection which he bore to his wife and children, and for divers other good causes and considerations, he was desirous of settling the property, subject to the annuity and mortgage, it was witnessed that *A. Culy* granted the property to the Defendants, *Knowles* and *Bothway*, and their heirs, upon trust to sell at the request of *Sarah Jane Culy*, wife of the settlor, during her life, or until she should marry again; and after her death or future marriage, at the discretion of the trustees, who were to stand possessed of the proceeds, upon trusts for *Sarah Jane*

Culy, for her separate use, without power of anticipation; and after her death or future marriage, in trust for her children by the settlor.

On the 30th of January, 1869, *Culy* mortgaged the property to the Plaintiff as a security for the repayment of £250, and the Plaintiff directly afterwards gave notice to the mortgagees under the mortgage deed of 1864, who were the solicitors who had prepared the settlement of 1867, and now acted for the trustees thereof, of his intention to redeem their mortgage. Messrs. *Collins* declined to take the money, as the title to the equity of redemption was in dispute. In reply to a subsequent letter, they informed the Plaintiff that the settlement of 1867 was not voluntary, but made for value, and therefore that his mortgage could not prevail against it. It was suggested by the Defendants that the mortgage to the Plaintiff was made by *Culy* for the mere purpose of upsetting the settlement.

The Defendants, by their answer, denied that the settlement of August, 1867, was purely voluntary, and stated that previously to the making of the settlement, the interest on the mortgage being in arrear, Messrs. *Collins* gave notice to the tenants to pay rent to them, and threatened to exercise their power of sale; that *Culy* consulted the Defendant *Knowles*, who was a cousin of *Culy's* wife's father, and *Knowles*, knowing *Culy* to be an intemperate and improvident person, advised him to make a settlement on his wife and children; and "by way of inducing him to make such settlement," offered to advance him £150 on his note of hand, to enable him to pay the interest on his mortgage and his other outstanding debts; and that *Culy* "was by such offer induced, and thereupon agreed, to make such settlement as was made by the indenture of the 21st of August, 1867."

The affidavit filed by *Knowles* supported this statement, and added, that "in consequence of his remonstrances and advice, and in consideration of the sum of £150, which he advanced him," the said *A. Culy* agreed to make a settlement of his estates on his wife and children; and on the 22nd of July, 1867, the said *A. Culy* went with him to the office of the Defendant *G. D. Collins*, and gave him instructions to prepare a settlement in accordance with the said agreement.

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The instructions thus given were signed by *Culy*, and were as follows:—

"I wish a settlement to be made of all my estates, subject to the existing mortgage for £2200 and the annuity of £28 per annum to Miss *Andrews*, to my wife for life, for her separate use, with remainder to my children equally. If my wife should marry after my death, her interest to cease and the trust to my children to come into effect. Trustees, Mr. *G. Knowles*, Mr. *Harry Bothway*. Mr. *Oldham* to concur. The estates to be sold after my wife's death or re-marriage, when youngest child attains twenty-one. Mr. *Collins*, solicitor, *Wisbeach*, to prepare the necessary document as soon as possible.

"July 22, 1867. *A. Culy*."

These instructions were laid before counsel, accompanied by the following observations:—

"The document, of which the above is a copy, is signed by Mr. *Culy* at the instance of his friend, with a view of saving his property to his wife and children, subject to the existing incumbrance. It is believed that at the present time he is not much, if at all, indebted beyond what he is able to pay; but it is feared, from his intemperate habits and easy disposition, that unless an endeavour is made to provide some provision for his family, they will ultimately be left destitute."

On the 12th of August, 1867, *G. D. Collins* advanced *Culy* £20, which was to be repaid out of the £150 to be advanced by *Knowles* on the completion of the settlement. The settlement was executed on the 21st of August, 1867, and *Knowles* then gave *Culy* a cheque for £50 6*s.* 2*d.*, and *G. D. Collins* a cheque for £99 13*s.* 10*d.*, for interest and costs on his mortgage and the £20 advanced by him, and at the same time *Culy* gave *Knowles* a promissory note for £150.

In July, 1868, *Culy* was adjudicated bankrupt, and an attempt was made by him and his assignees, but without success, to get the settlement set aside by the Court of Bankruptcy.

Culy made an affidavit in the suit, in which he insisted that no valuable consideration whatever was paid or given to him for the execution of the settlement, and that it was purely voluntary on

his part, and made in consideration of natural love and affection only. He admitted that *Knowles* had offered to advance him £150, but denied that the £150 was advanced to him as a consideration for the settlement, or that it had anything whatever to do with the execution of it. He also stated that the offer was made before anything at all was stated or suggested with reference either to a will or settlement, and that he was not induced to make the settlement for the purpose of obtaining money to satisfy his creditors. With respect to the £150, he had always considered and treated it as a debt due by him to *Knowles*, of which payment could at any time be demanded, and accordingly it had been included in the schedule of debts filed in the bankruptcy proceedings.

The property included in the settlement had been valued at about £1300 beyond the charges affecting it, but the Plaintiff alleged it to be worth upwards of £1800.

The Vice-Chancellor dismissed the bill with costs, and from this decree the Plaintiff appealed.

Mr. *Kay*, Q.C., and Mr. *Alexander*, for the Appellant:—

There was no valuable consideration for this settlement. The advance of £150 on a promissory note, payable on demand, which might be called in next day, could form no consideration, and it was never treated as a consideration until after the suit was commenced. It is not alluded to in the settlement itself, nor in the instructions sent to counsel, although it was plainly the object of all parties to make a binding settlement. It was not so treated in the examination of *Knowles* in the bankruptcy, nor in the first letter of Messrs. *Collins*, in reply to the notice of the Plaintiff's mortgage. It was not even called a consideration in the answer of the Defendants; they only say that *Knowles* offered the loan "as an inducement" for *Culy* to make a settlement. It was only by an afterthought, doubtless suggested by counsel, that this was called a consideration in the affidavits. We admit that a small consideration will support an otherwise voluntary settlement; but an inducement is not a consideration: there must be something in the nature of a bargain. In all the cases relied on by the other side, such as *Thompson* v. *Webster* (1), *Ford* v. *Stuart* (2),

(1) 4 De G. & J. 600; 9 W. R. 641.

(2) 15 Beav. 493.

(3) See W N (1876) 128.

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Holmes v. *Penney* (1), *Roe* v. *Mitton* (2), and *Townend* v. *Toker* (3), there was a bargain between the parties. If such a transaction as this should be held to constitute a valuable consideration, it will be impossible for purchasers to know when a settlement is voluntary and when it is not.

Mr. *Fry*, Q.C., and Mr. *Fletcher*, for the Defendants, were not called on.

LORD HATHERLEY, L.C.:—

This case has been extremely ably argued, and every point has been raised which could possibly be suggested. The Vice-Chancellors' judgment pointed out the difficulties which existed in reference to the way in which the case was originally brought forward by the Defendants, as contrasted with the view that is now taken when the case comes to be sifted and the whole matter is fully discussed in Court.

With regard to the observation which was made by counsel, that purchasers would hardly know how they are to deal with property where there has been a voluntary settlement, I do not think anything could be more unsatisfactory than what we find to be the state of the law under which a person, with full and distinct knowledge of a voluntary settlement, is able at any time to overthrow it. It is quite established that, although a settlor cannot get rid of such a settlement directly, he can do so indirectly by making a mortgage of the property to somebody else for the purpose of being able to destroy the settlement.

Now it is not for me to say whether the mode by which the Court has attempted to remedy some of the evil of this state of the law, namely, by holding that a small and inadequate consideration is sufficient to support such a settlement under the Statute of *Elizabeth*, has diminished the extent of the mischief. But so it is, that a very small consideration is admitted to be sufficient. If this bargain which is alleged to have been entered into is established, then we have this fact, that in consideration of an advance of £150 to the settlor, he agreed to execute this settlement upon his wife and children. That being the case, the authorities are

(1) 3 K. & J. 90. (2) 2 Wils. 356. (3) Law Rep. 1 Ch. 446.

sufficient to shew that such a consideration, although merely by way of loan, secured by a promissory note, is adequate to support such a settlement. The whole thing, therefore, resolves itself into a question of evidence, whether there was or was not such a bargain as that which is asserted to have taken place.

Now there are some curious circumstances that have happened in the course of the inquiry; but I think they may be reconciled in this way: I have very little doubt that the solicitor who prepared this settlement, although he may be a very good lawyer, was not acquainted with the length to which the cases have gone in supporting settlements of this description. Doubtless he was not aware that a transaction of this description, that an advance of £150 to the settlor as a loan secured by a promissory note, would be sufficient to support a settlement of property worth £1300 more than it was mortgaged for, as against subsequent purchasers. And, therefore, although he was very desirous of making an effective settlement, yet in sending instructions to counsel to prepare this settlement, he only seems to have instructed him to recite that it was for providing for the settlor's wife and children, and divers good considerations, that the settlement was effected. In sending counsel instructions, he was careful to tell him that the settlor was not indebted to the extent of insolvency; but he did not tell him about this advance of £150, and consequently there is nothing to be found in the deed about the advance of £150 being the consideration.

This fact is deserving of great consideration in coming to a conclusion in this case. Nevertheless, I feel with the Vice-Chancellor that I cannot reject the evidence that has been given, and, I think, strongly supported by the surrounding circumstances of the case. Mr. *Knowles*, who lent the £150, and who was a distant relation of the settlor's wife, was anxious that a settlement should be made upon the wife and children, and uses this expression in the answer, "As an inducement for him to do so, I agreed to advance him the sum of £150, to enable him to pay the interest on his mortgage and his other outstanding debts." And, in his affidavit, he says that he offered to lend *Culy* £150 upon his promissory note, to get him out of his immediate difficulties, and he, "in consideration of" that advance, agreed to execute a settlement.

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Mr. *Kay* contends that the advance was, at most, only an inducement, and that an inducement will not be sufficient. But I think that if a man is induced to do a thing upon the faith of £150 being paid to him, that amounts to a bargain between the parties, whether the word describing the transaction be "inducement" or "bargain." The question is twofold—whether the agreement at the date of the settlement to advance £150 led this man to do that which the person lending the money asked him to do, namely, to make a settlement; and whether the person who agreed to advance the £150 consented to do so upon that understanding, but not otherwise. If those questions are answered in the affirmative, I apprehend that is a "consideration" in every sense and meaning of the word.

It certainly is a somewhat suspicious part of the case, that the word "consideration" is constantly repeated in the evidence, although it never finds its way into any document. Still it is consonant with the view that the parties were not aware of the amount of consideration necessary in point of law to support the settlement, although the fact might be well known to them that the one had been induced to make the settlement by the £150 lent to him upon the promissory note, and the other had been induced to lend it to him by the promise that a settlement should be executed. [His Lordship then commented on the evidence of *Culy*, *G. D. Collins*, and *Knowles*, and continued:—]

A good deal has been said about the examinations in the Bankruptcy Court, in which nothing was elicited about the consideration for the settlement. The question there was under 13 Eliz. c. 5, and not 27 Eliz. c. 4. *Knowles* was examined, and was asked whether anything passed on the execution of the settlement, and he said he paid £150. He does not make mention of its being a condition precedent that a settlement should be executed. Nevertheless, it is clear that he paid it upon the settlement being executed, and not before. He was not even asked to pay it before. He was only asked to advance £20 before the settlement, and it was agreed that it was to be taken in part payment of the £150. It appears, therefore, to me that the doling out of the £20, instead of advancing the whole amount, and the suspense of the payment of the rest until the settlement was executed, are circumstances in

favour of the truth of the story of *Knowles* and *Collins*, more especially when I find that no attempt has been made to cross-examine them. The question might have been asked them, "When did you first take up the notion about this advance being a consideration for the settlement instead of a separate transaction?" But no such question has been asked. On the other hand, it is distinctly sworn that the settlement was for valuable consideration, and it is clear that the money was not advanced till the settlement was executed. Under these circumstances, I cannot disbelieve the evidence of these witnesses. The Vice-Chancellor made a decree dismissing the bill with costs, and I cannot interfere with that decree. The appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Blake & Snow.*

Solicitor for the Defendants: Mr. *G. F. Smith*, agent for Mr. *Collins, Wisbeach.*

BENT *v.* CULLEN.

Will—Annuity—Gift of Principal.

A testator gave to his wife £50 a year, to be paid out of the interest, dividends, and produce arising from his personal property, and gave, after her decease, the said £50 to his two daughters and his granddaughter, or the survivors:—

Held, on the construction of the will, a gift to the survivors of the principal which would produce the annuity of £50.

Decision of *James*, V.C., reversed.

14 Eq. 144-5,
36 L.D. 212-4
13 Ch D 567
19 Ch D 246

THOMAS MINTER, by his will, gave to his executors all his personal estate, upon trust to pay the interest, dividends, and produce in manner following: "First, I give and bequeath unto my wife *Ann Minter* £50 a year, which I direct my said trustees and executors to pay the same to her; that is to say, £25 half-yearly out of the interest, dividends, and produce arising from all my personal property during her natural life, or so long as she continues my widow, and after her decease or next marriage then I give and bequeath the said £50, as received by my said wife, unto and amongst my two daughters, *Sarah*, the wife of *William*

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Griffiths, and *Alice*, the wife of *Hunt Jeffery*, and *Maria Quested*, the child of my daughter *Margaret*, deceased, which I direct my said trustees to divide and pay equally between them, or the survivors of them, subject, nevertheless, to the same control as will be hereafter mentioned. And I also give and bequeath unto my son-in-law *Hunt Jeffery* the sum of £100, to repay him the money he advanced to my daughter *Sarah*, and which I direct my said trustees to pay to him. I also give and bequeath the interest, dividends, and profits arising from the residue of my property unto and amongst my two daughters, *Sarah*, the wife of *William Griffiths*, and *Alice*, the wife of *Hunt Jeffery*, and *Maria Quested*, the child of my daughter *Margaret*, deceased, which I direct my said trustees to divide and pay equally between them, or the survivors of them, during the term of their natural lives."

The testator then proceeded to declare that the dividends given to his daughters should be to their separate use, and after their respective deaths should be divided amongst their respective children, and desired that the share of the residue of his property so given to *Maria Quested* should be paid to her for her separate use.

The testator died in 1851. His daughter *Sarah*, wife of *William Griffiths*, died in his lifetime. His widow, *Ann Minter*, died in 1866. A suit was instituted for the administration of his estate, and the Vice-Chancellor *James*, on the 4th of March, 1870, made an order declaring (amongst other things) that upon the decease of *Alice Jeffery* and *Anna Maria Bousquet* (in the will described as *Maria Quested*), their respective moieties of the said annuity of £50 would cease, and the funds set apart to provide for the same would fall into the residue.

The Plaintiff in the suit, who claimed under Mrs. *Bousquet*, appealed.

Mr. *Bristowe*, Q.C., and Mr. *Roberts*, for the Appellant:—

We contend that the gift of the dividends in this case amounts to a gift of the principal: *Elton* v. *Shephard* (1); *Ross* v. *Borer* (2); *Stokes* v. *Heron* (3). It is clear that the testator meant more than

(1) 1 Bro. C. C. 532.
(2) 2 J. & H. 469.
(3) 12 Cl. & F. 161.

a gift of an annuity for the life of his wife: *Kerr* v. *Middlesex Hospital* (1); *Bryan* v. *Twigg* (2). The *Wills Act* does not affect the question. It is doubtful whether *Blewitt* v. *Roberts* (3) is now law. At all events, it cannot be reconciled with *Stokes* v. *Heron* (4), as was said in *Hedges* v. *Harpur* (5).

Mr. *E. Ward*, for the children of *Alice Jeffery*:—

In the cases relied upon by the Plaintiff, there were gifts of so much capital as would produce the annuity. Here the gift is merely of an annuity which, in the absence of any expression to the contrary, always means a life annuity only: *Jones* v. *Randall* (6); *Hedges* v. *Harpur*. All the annuities are payable out of income, and therefore the direction to pay this out of income amounts to no more than a direction to pay income. The gift to the separate use also points to a life interest only. This case comes clearly within *Blewitt* v. *Roberts*.

Mr. *Karslake*, Q.C., Mr. *Fooks*, Q.C., and Mr. *Jolliffe*, for other parties.

LORD HATHERLEY, L.C.:—

This case has been very well and ably argued.

As regards the principal question, the first remark I have to make is, that the case clearly comes within the authority of *Stokes* v. *Heron*, and is not within the authority of the other cases cited. I come to that conclusion simply because I find a distinct gift of the income of a given fund, and that is allowed, upon the authority of no less a person than Lord *St. Leonards* (7), to be a form of gift which takes it wholly out of the authority of cases like *Blewitt* v. *Roberts*, which case was founded upon the older decision of Lord *Hardwicke* in *Savery* v. *Dyer* (8), who said that where an annuity was created by the gift, then it was to be held to be for the life only of the person to whom it was given. There

(1) 2 D. M. & G. 576.
(2) Law Rep. 3 Ch. 183.
(3) Cr. & Ph. 274.
(4) 12 Cl. & F. 161.
(5) 3 De G. & J. 129.
(6) 1 Jac. & W. 100.
(7) 4 Ir. Eq. Rep. 286.
(8) Amb. 139.

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might be considerable difficulty in saying that an annuity of £30 given to *A.* for life, and on his decease to *B.*, *C.*, and *D.*, is to be construed as a gift of three annuities of £10 each to each of the three persons for different durations *inter se*, and, therefore, logically, you would find a great difficulty in saying that the same thing was given over; yet I take it that the way in which the Court gets over the difficulty is by saying that the annual payment shall be divided into as many portions as there are recipients, and that as to each of them it is an annuity given to each of them, and is to last as to each of them for their respective lives.

However, the cases are clear upon this, that a gift of the income of a fund to a particular person or persons is a gift of the whole fund. If I give all the interest of a given fund to *A. B.*, and say nothing more, *A. B.* takes the whole fund. Can it be different when I give £100, part of the interest of a given fund, to *A. B.*? Surely he takes the principal which produces that sum of £100. If I give half the interest of a certain sum to *A. B.*, without any words of limitation, he will take the half of the capital just as in the other case he would take the whole capital if I gave him the whole interest; and it is just the same if I give him a half or a quarter, or any other aliquot share. In *Stokes* v. *Heron* (1) it was called an annuity; but I do not think that the calling it an annuity makes any difference. The question really is, whether the income of the fund has been given without assigning any duration for it; and if so, the fund is given out and out.

Then, under which class of cases does this fall? Does it fall under the decision in *Blewitt* v. *Roberts* (2), or under the decision in *Stokes* v. *Heron*? These cases are not inconsistent, as appears from the words used in *Stokes* v. *Heron* by Lord *Cottenham*, the Judge who also decided *Blewitt* v. *Roberts*.

Now, what are the words used in this will? The testator gives his wife £50 a year out of the dividends, interest, and produce of his estate. Would it have made any difference if he had, instead of this, given her half the dividends, interest, and produce? He then gives the £50 to his daughters and granddaughter; and afterwards directs £100 to be paid, and then gives the interest,

(1) 12 Cl. & F. 161. (2) Cr. & Ph. 274.

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dividends, and profits of the residue of his property to his two daughters and his granddaughter. This seems to me to be within the rules laid down by Lord *St. Leonards* (1), and by Lord *Cottenham* in *Stokes* v. *Heron* (2), the testator having given, in fact, the capital which produces the £50.

We have got express words which meet this case, and it is not necessary to consider how it would have happened in a different state of circumstances. No such question arises as arose in some of the other cases which have been cited, and the persons alive at the death of the tenant for life must take the whole of the *corpus* between them. A Judge is very much inclined to depart from the exact words when he fancies he sees something more than the words will warrant; but I certainly acquiesce in the rule, that a testator only means what he says in express words. Therefore, I must vary the Vice-Chancellor's decree, and declare that Mrs. *Bousquet* and *Alice Jeffery*, the two surviving legatees, take the fund producing the £50 per annum. A sufficient portion of the testator's estate must be taken in order to produce that sum, to be divided between them. What is done in such case is, that the Court takes it as invested in 3 per Cents.

Solicitors: Mr. *H. Dinn;* Messrs. *Talbot & Tasker.*

BETTS *v.* WILLMOTT.

L. C. 1871 Jan. 30.

Patent Suit—Onus of Proof—Article manufactured abroad—Implied License.

In a suit to restrain the sale of a patented article, it is incumbent on the Plaintiff not only to prove the sale, but to prove that the article was not made by himself or his agents.

Where the owner of a patent manufactures and sells the patented article in a foreign country as well as in *England*, the sale of the article in one country implies a license to use it in the other. But if he has assigned his patent in either country, the article cannot be sold so as to defeat the rights of the assignee.

The owner of an English patent manufactured the patented article in *France* as well as in *England*. In a suit to restrain the sale of the article in

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(1) 4 Ir. Eq. Rep. 286. (2) 12 Cl. & F. 161.

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England, the Plaintiff proved that it was not made at his manufactory in *England*, but could not prove that it was not made at his manufactory in *France*.

The bill was dismissed with costs.

The decision of *James*, V.C., affirmed.

THIS was an appeal from a decree of Vice-Chancellor *James*, dismissing the Plaintiff's bill with costs.

The bill was filed on the 12th of August, 1865, for an injunction to restrain an alleged infringement of the Plaintiff's patent for making metallic capsules of tin and lead compressed together for covering the corks and necks of bottles; and for damages sustained thereby.

The patent, which has been repeatedly the subject of litigation (1), was originally granted in 1849, and was prolonged for a further term of five years, from the 9th of December, 1862. The Plaintiff also took out a patent in *France*, which had expired before the institution of this suit.

The Plaintiff complained that the Defendant *W. Willmott*, who is a retail chemist, had sold a bottle of *Rimmel's* Toilet Vinegar, which had a capsule similar to those manufactured by him, in violation of the patent.

The Defendant, in the 24th paragraph of his answer, mentioned certain houses in *London* of whom he had purchased capsuled bottles; but he stated that the Plaintiff himself manufactured capsules in *France* and sold them without any distinctive mark, and suggested that the capsule on the bottle in question (which was numbered as an exhibit 210) might have been procured from the Plaintiff's own manufactory.

The Plaintiff filed an affidavit, in which he said: "The capsules used by the Defendant had not been made by me. I have never sold any capsules to the Defendant, or to any of the persons mentioned in the 24th paragraph of the Defendant's answer; and I have never authorized the use of such capsules by them or by the Defendant."

The Plaintiff was afterwards cross-examined on his affidavit, and in the course of his cross-examination he admitted that he had a manufactory at *Paris*, carried on under the name of Messrs.

(1) See *Betts* v. *Menzies*, 10 H. L. C. 117; *Betts* v. *De Vitre*, *Betts* v. *Neilson*, Law Rep. 3 Ch. 429.

Espinasse, whose business he had bought, and another at *Bordeaux;* and that the capsules made there had not the distinctive mark of the English capsules. On being shewn several capsules similar to that numbered 210 (which had been lost in the course of the inquiry), he said: "I don't know whether the exhibit No. 210 did or did not correspond in external appearance with these eleven capsules. The exhibits numbered 204 and 207 being infringements, I have no doubt No. 210 did correspond in external appearance with them, but I cannot compare them with a thing which is not present." And again, referring to the same exhibits, he said: "I cannot say by whom those capsules were manufactured. I believe they are infringements, and that they are not of the house of *Espinasse.* I found this, my belief, on this—that *Rimmel's* dies in *Paris* do not correspond, as I have been informed, with the stamping on those; but I will not swear that they do not correspond exactly." And again: "I will not swear that each of the capsules on the eleven exhibits was not made by my house of *Espinasse,* or that they were not sold and delivered by that house to *Eugène Rimmel.* If the *Espinasses* had been faithful to me, they never could have been *Espinasse's* capsules, because it was contrary to my express instructions." And again: "Unless the capsules are of a certain kind, they have no business to come into this country, and hence would be ignored by me. I explain it in this way: *Betts,* as a manufacturer in *France,* is a Frenchman. I sell capsules there to be used upon bottles, and such capsules may come into this country; but no capsules off bottles of any kind should I make or tolerate to have to come into *England,* so to have one set against another. There is *Betts* an Englishman, and *Betts* a Frenchman, the one with English rights, and the other with French rights. Those capsules which may come into *England* are those which have my patent trade-mark and my legend round them, and those may come on bottles."

The Vice-Chancellor dismissed the bill with costs; and from this decree the Plaintiff appealed.

Mr. *Willcock,* Q.C., Mr. *Grove,* Q.C., and Mr. *Everitt,* for the Appellant:—

The evidence establishes that the Defendant infringed the

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Plaintiff's patent, unless he can shew that the sale was authorized by the Plaintiff, and the onus is on the Defendant to prove this. The Plaintiff swears that this capsule was not made at his English manufactory, nor with his license. The Defendant sets up the defence that it may have been made by the Plaintiff's agents in *France*. But, in the first place, there is no proof of this; and although the Plaintiff scruples to pledge his oath to the contrary, he states that it is most improbable that it was so; and, in the second place, if it was made by the Plaintiff's agent abroad, that fact would not legalise its sale in this country, in violation of the English patent. Suppose the Plaintiff had a patent in *France* as well as in *England*, and had assigned his English patent, could he have worked his French patent so as to flood the English market with French capsules, to the prejudice of his assignee? Or, again, suppose he had assigned his French patent, could the French assignee have sold capsules in *England* without the Plaintiff's licence? *Caldwell* v. *Vanvlissengen* (1). No doubt there might be circumstances which would induce a jury to presume that he had in such a case given a licence to the French assignee to sell the capsules where he pleased; but the facts here negative any intention that the French capsules should be sold in *England*, for the stamps on the French and English capsules were carefully distinguished. If the infringement is established, the Plaintiff is entitled to the costs, although the actual loss of the Plaintiff was trivial. The circumstances made it absolutely necessary for the Plaintiff to be strict in guarding against infringements: *Burgess* v. *Hills* (2); *Burgess* v. *Hately* (3).

Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Langley*, for the Defendant, were not called on.

LORD HATHERLEY, L.C.:—

The onus is thrown on Mr. *Betts* of proving two things. One of them, it appears to me (though I have not heard the argument for the Defendant upon it), he has proved, namely, that there has been a use of his invention. But there is another question, namely, whether it has been an unauthorized use. It appears to

(1) 9 Hare, 415. (2) 26 Beav. 244. (3) 26 Beav. 249.

5 Jur. N.S. 233.

me that, the onus being thrown on Mr. *Betts* to prove that, he has not discharged himself of it. He has to shew that this thing which the Defendant is using is not manufactured by him. He has attempted to do so in the first instance, by an affidavit in which he says that the capsules used by the Defendant were not made by him. But in his cross-examination he says that he is not only the manufacturer of this article in *England*, but that it is manufactured abroad by him in two different manufactories. It appears that he bought up at *Paris* a business where the article was manufactured in the name of *Espinasse*, and he continued afterwards to carry on the business there through the medium of Messrs. *Espinasse*, who were acting as his paid agents; and therefore, for all purposes, Messrs. *Espinasse* are the Plaintiffs in the suit. [His Lordship then referred to the passages in the Plaintiff's cross-examination set forth above, and continued:—] This part of the evidence, to my mind, creates the great difficulty in the Plaintiff's case. Unluckily, capsule 210 itself has been lost; and we cannot therefore deal with that specially. But the Plaintiff will not pledge himself that there is any real distinction between 210 and the others which are exhibited; and as to those others, he says that, although he has sworn that they were not manufactured by him, yet he will not take upon himself to say that they were not manufactured by his house in *Paris*, or were not sold by that house to *Rimmel*.

I apprehend that, the onus being on the Plaintiff to shew, not merely that the thing made is his own patented article, but that it has been unlawfully sold, he must be prepared to swear distinctly that it is not manufactured by him or his agent. Suppose that he had three houses of manufacture—one in the north of *England*, one in the west of *England*, and one in *London*—I cannot doubt that it would be his duty, in making out his case before a jury, to prove not only that the article was of the same description as the patented articles, but that it was not made by himself; and for that purpose he would have to call as witnesses persons who had the control of his houses in the north and west, as well as in *London*, to shew that the article was not made by them. These capsules are sold by millions, and are sold for the purpose of being distributed in every shop throughout the country; and it would be almost impossible

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for the persons who purchase from time to time, not the capsules themselves, but bottles covered with the capsules, as part of their stock-in-trade—sometimes a few bottles of one kind, and sometimes a few bottles of another kind—to go round and trace these bottles through the variety of persons in whose possession they may have been, in order to shew that they came from the Plaintiff's manufactory. I think that, in the first instance, there should be the Plaintiff's oath that he did not manufacture the particular article; and if he takes that oath, and throws the onus on the Defendants, they must meet it as best they can. This Plaintiff attempted to discharge that obligation in the first instance by saying that he did not manufacture the capsule in question; but, on cross-examination, he says, in effect: "When I made that affidavit I did not intend to swear that it had not come out of my manufactory in *France*, and I will not swear that now." The Vice-Chancellor made some strong observations upon the Plaintiff's evidence, but I do not myself wish to speak so strongly of it, because the Plaintiff may possibly have had in his mind that view of the law which has been submitted by his counsel, and upon which I quite agree with Mr. *Grove*, that an argument may be raised, although I do not remember such a point having been brought before the Court before. The point is this: Supposing a man to have a patent in *France* and a patent in *England*, and he establishes manufactories in each country, it is contended that if he sells the patented article in *France* it is for the French market, and it does not justify a person buying the article in *France*, and bringing it over to *England*, and using it here; and Mr. *Grove* put the case of his having sold the English patent to an assignee, and still continuing the manufacture in *France*, and asked if the importer of any article sold in *France* would not come within the doctrine of *Caldwell* v. *Vanvlissengen* (1). No doubt, in the case so put, the importer would be restrained, because the license to sell, which belonged originally to the patentee, would then be vested in his assignee; and therefore no license in *England* given by the original patentee after he had sold the patent could authorize the use of the article, so as to defeat the right of the assignees in *England*.

(1) 9 Hare, 415.

And, of course, in exactly the same way, if the original patentee assigned his patent in *France*, no sale by him in *England* would be allowed to defeat the rights of the assignee in *France*. In other words, it comes within the doctrine of leave and license, and there could be no leave and license in such a case. But where a man carries on the two manufactories himself, and himself disposes of the article abroad, unless it can be shewn, not that there is some clear injunction to his agents, but that there is some clear communication to the party to whom the article is sold, I apprehend that, inasmuch as he has the right of vending the goods in *France* or *Belgium* or *England*, or in any other quarter of the globe, he transfers with the goods necessarily the license to use them wherever the purchaser pleases. When a man has purchased an article he expects to have the control of it, and there must be some clear and explicit agreement to the contrary to justify the vendor in saying that he has not given the purchaser his license to sell the article, or to use it wherever he pleases as against himself. He cannot use it against a previous assignee of the patent, but he can use it against the person who himself is proprietor of the patent, and has the power of conferring a complete right on him by the sale of the article.

I am therefore of opinion that, if the Plaintiff cannot shew that he has not himself sold the very article the use of which he now seeks to prohibit, he cannot succeed by way of injunction in this Court any more than he would in an action at law. Therefore, on that ground, the decision of the Vice-Chancellor being right, the appeal will be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Robinson, Son, & Edmonds.*
Solicitors for the Defendant: Messrs. *Flux & Co.*

L. C. 1870 Nov. 9, 11; Dec. 2, 19.

In re AGRICULTURIST CATTLE INSURANCE COMPANY.

BUSH'S CASE.

Company—Directors—Transfer—Execution of Deed—Registration—Certificate—Duty of Directors—Lapse of Time—Value of Goodwill.

A company had incurred considerable losses, and unless credit was taken for the value of the goodwill, so much of the capital had been lost that the directors ought, according to the deed of settlement, to have dissolved the company. Reference was made to an accountant, whose report shewed heavy losses, and recommended a change. Meetings of the company were held, at which the accounts of the company were shewn; but this report was not mentioned to the shareholders. The existing directors all transferred their shares to other persons, who became directors. One of the existing directors agreed to transfer his shares to one of the new directors, payment being postponed, and to some extent contingent. A deed of transfer was executed by both. The transfer was entered on the register of transfers of the company and returned to the Joint Stock Companies Registry Office. The transferee did not execute a deed of covenant as required by the deed of settlement. By that deed the approval by the directors of a transferee was required, and a certificate of such approval was to be given. No certificate could be found, but there was evidence that such a certificate had been given, but that it was not signed at a meeting, and that two of the directors who signed it were interested in the transfer. A meeting of the company was held on the day of the transfer, and another a year afterwards. A year after that the company was wound up:—

Held, that, under the circumstances, the transfer was made *bonâ fide*, and that the transferor was not a contributory:

That the non-production of the report was not a ground for impeaching the transaction for fraud:

That a director, though interested in it, was competent to approve of a transfer:

That it was the duty of the directors to compel execution of a deed of covenant by the transferee, and that the transferee could not be affected by their neglect, though both he and the transferor were directors:

That the shareholders must have been aware of the transfer, and might have objected at the meetings if they did object; and that the irregularities of the transfer could not be taken advantage of after the lapse of several years.

Order of the Master of the Rolls reversed.

THE *Agriculturist Cattle Insurance Company* was formed in 1845 and registered in 1855. Its deed of settlement, as finally altered, provided that the capital of the company should be £500,000, in

100,000 £5 shares. There was no restriction as to the liability of the shareholders.

Clause 47 declared that no person should be eligible to the office of director unless at the time of his election he should be the holder of, and should for three months preceding, have held 100 shares at least: provided always, that it should be lawful for the board of directors to dispense with the qualification for the office of director arising from the having been the holder of such shares as aforesaid for the three months preceding the election.

By clause 60, a board of three directors was authorized to act. By clauses 177 and 177*a*, it was provided that when any holder of shares had procured any other person to be a shareholder, he should give notice thereof at the office of the company; and the board of directors should, without delay, take such notice into consideration, and should, under the hands of such directors, or any of them, certify in writing to the holder or holders giving the notice their approbation or disapprobation of the proposed shareholder. By clause 178, the holder of any shares who should have procured any person to become a shareholder approved of by the directors, should transfer the same to the proposed shareholder in such form as the directors should think proper. The other clauses in the deed, which are important to the questions in this case, are as follows:—

Clause 185: "That every person who may have been approved of by the board of directors as a holder of any share or shares in the company, and to whom a transfer of such share or shares shall have been made, and who shall not then be a shareholder of the company, shall, within one calendar month after such transfer, execute at the office of the company, or at such other place as the said board shall reasonably require, either in person or by attorney, a deed of covenant to abide by the rules and regulations of the company, whereupon such person shall become a shareholder of the company."

Clause 188: "That every person who may have been approved of by the board of directors as a shareholder of any share or shares in the capital of the company, and to whom a transfer shall have been made of such share or shares, and who at the time of such transfer shall be a shareholder in respect of any other share or shares, shall, as to the share or shares which may have been so

L. C. 1870 BUSH'S CASE.

transferred to him or her, be considered a shareholder in the company from the date of such transfer, and shall thenceforth be subject to all the instalments which may thereafter be called for on such share or shares, and to all other duties, claims, demands, and liabilities in respect thereof: provided, nevertheless, that if from any cause whatever the registry of such transfer in the proper office for that purpose provided by the statute in that case made and provided, shall have [been delayed] beyond seven clear days from the time of such transfer being made, then and in such case such person shall be considered as a shareholder from the time of the return being duly made thereof to the said registrar."

Clause 189: "That when and so often as any shareholder shall dispose of any share or shares to the board of directors, or shall procure any other person or persons to become a holder or holders of any share or shares held by him or her, and such person or persons shall have been duly approved of by the board of directors, and shall have executed such deed of covenant as hereinbefore is mentioned, the board of directors shall, if all instalments which may then have been previously called for on such share or shares, and such interest, if any, therein as aforesaid, shall have been duly paid at any time thereafter upon the request and at the expense of such former shareholder, or his or her executor or administrator, cause to be delivered to him, her, or them, a certificate signed by three of the directors, verifying that he or she is no longer the holder of such share or shares, and the time when he or she ceased to be such shareholder."

Clause 190: "That when and so often as any person or persons not a purchaser or purchasers from the board of directors shall, in the manner hereinbefore required, have become a holder of any share or shares in the company, and shall have executed a deed of covenant to observe the covenants, agreements, and provisions contained in these presents, the last holder or owner of such share or shares, and all persons claiming through or under him other than the new shareholder or shareholders shall from the time of such new shareholder or shareholders becoming such, and on payment of such moneys (if any) as may be owing to the company for or in respect of such share or shares, be as between the company and such last shareholder for ever acquitted and discharged from all

further claims, demands, and liabilities in respect of such share or shares; and the certificate to be given by the directors, as hereinbefore mentioned, of such last shareholder having ceased to be a shareholder in respect of such share or shares, shall be conclusive evidence of such acquittance and discharge in respect thereof."

Clause 191: "That if ever the losses of the company shall have absorbed not only the whole of the fund called the reserved fund, but also £80 per cent. on the gross amount of the capital subscribed for, the said company shall be *ipso facto* dissolved; and the board of directors for the time being shall, within twenty days, or as soon after such losses being incurred as the said board possibly can, and they are hereby required to call a special general meeting of the shareholders in such manner as hereinbefore mentioned, and lay a statement of the affairs of the company before such meeting."

Mr. *Bush*, the Appellant in this case, had, in the year 1854, 100 shares allotted to him, and became a director. He afterwards advanced a considerable sum of money to the company; and in 1856 he took 300 more shares of £5 each, the amount to be paid for which was set off against the debt due to him, leaving about £3000 due.

The company obtained a large business, which appeared to result in heavy losses. In 1847 a winding-up was suggested, on the ground of loss of capital, and from that time the company was continually in difficulties. In 1858 there were serious disputes amongst the directors, and Mr. *Evans*, an accountant, was called in by them to report on the state of the company.

Mr. *Evans* accordingly, on the 18th of March, 1858, reported that "The statement of affairs shews a deficiency or loss to December 31st last (including policy risk, estimated at £16,129) of £43,973 18*s.* 10*d.* The paid-up capital amounted to £22,785 17*s.* 6*d.*, and the deficiency, therefore, exclusive of capital, was £20,888 1*s.* 4*d.*, or £6068 18*s.* 10*d.* in excess of the unpaid subscribed capital. On the other hand, you have the value of the business created, with its widely-extended connection; and although I can offer no opinion upon the amount at which this should be stated, there can be no doubt that the present organisation, which would necessarily cost a large sum, must be valuable either in transfer to another company

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or as a basis for future operations—the groundwork for a more extensive and, it is to be hoped, a more profitable business." Mr. *Evans* also objected to the manner in which the books had been kept, as not enabling the company to guide its steps by the experience acquired. He said that the premiums were, in 1857, double what they were in 1854; but the business had paid no better. He stated that the total loss to the 31st of December was £89,780, which was reduced by a gain of £46,106 upon cancelled shares. He recommended a further analysis of the accounts.

This report was communicated to the directors.

On the 10th of April, 1858, the annual meeting of the shareholders of the company was held, at which the directors produced the accounts of the company, and made a report, but the report of Mr. *Evans* was not read or noticed at the meeting.

The directors at this time were Mr. *Fitzpatrick*, General *Hope*, Mr. *Johnson*, Mr. *Smith*, Mr. *Tyler*, Mr. *Western*, and Mr. *Bush*. There had been disputes between the directors, and either in consequence of these disputes, as was maintained by Mr. *Bush*, or in consequence of the anxiety of the existing directors to get free, as was contended on the other side, it was arranged that several of the existing directors should transfer their shares to others, who appeared to be connected with a company called the *Bank of Deposit*.

Accordingly, at different times in 1858, *Fitzpatrick*, *Smith*, and *Tyler* transferred their shares to Mr. *Wall*, Mr. *Bere*, and Major *Adair*, and ceased to be directors. On the 7th of April, 1859, *Bere* transferred some of his shares to Lord *Keane* and some to *Peter Morrison*; Colonel *Western* transferred his shares to Major *Adair*, and ceased to be a director; and General *Hope* transferred his shares to *Peter Morrison*.

On the 8th of April, 1859, Lord *Keane*, Major *Adair*, Mr. *Morrison*, and Mr. *Bere* were appointed directors by the board of directors, the continuing directors passing a resolution that, as to the three first, the qualification arising from having been the holder of shares for three months be dispensed with.

At the annual meeting of the company, held on the 9th of April, 1859, General *Hope* was in the chair; a report by the directors was read, and the accounts of the company were laid before the

meeting, but *Evans'* report was not mentioned. The proposed retirement of *Hope*, *Johnson*, and *Bush* was not mentioned, and *Hope* and *Johnson* were re-elected directors, and the appointment of Lord *Keane*, *Morrison*, *Adair*, and *Bere* was confirmed. It was admitted that there had been losses, and that no dividend could be declared, and that more care must be exercised; but the shareholders passed a resolution that the company was in a satisfactory position. Soon afterwards the directors agreed to waive half their fees.

The dealings with Mr. *Bush's* shares were as follows:—

By an indenture on a printed form, dated the 9th of April, 1859, and executed by *Bush* and *Morrison*, *Bush*, in consideration of £2000, "payable in certain events" to him by *Morrison* and others, bargained, sold, assigned, and transferred to *Morrison* 400 shares, numbered, &c., of and in the undertaking called the *Agriculturist Cattle Insurance Company*, to hold unto *Morrison*, his executors, administrators, and assigns, subject to the several conditions on which *Bush* held the same; and *Morrison* agreed to accept the same.

By articles of agreement, dated the 11th of April, 1859, made between *Bush* of the one part, and *Morrison* and Major *Adair* of the other part, after reciting that the company was indebted to *Thomas Hughes* in the sum of £3000, to *T. Woodgate* in the sum of £1500, to *S. Tiarkes* in the sum of £1060, and that *Bush* had transferred his 400 shares to or by the direction of *Morrison*, it was agreed between the parties that in the event of *T. Hughes*, *T. Woodgate*, or *S. Tiarkes* seeking to enforce payment before the 11th of April, 1861, then *Bush* would advance and pay, on the request of the company, a sum of money sufficient to discharge the claims, the company thereupon giving to *Bush* a bond for the repayment of the sum advanced and paid. That subject thereto, *Morrison* and *Adair* would, on the 11th of April, 1861, pay to *Bush* the sum of £2000, being the consideration-money for the 400 shares so transferred, with interest at 5 per cent., but so that *Bush* should have a lien or charge upon such shares for the purchase-money and interest until paid or disposed of. And in the event of the shares being disposed of, then the purchase-money should be immediately payable. That in the

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event of the company not succeeding (that is to say), not paying, or not being in a position on or before the 11th of April, 1861, to pay a dividend of 5 per cent., *Morrison* and *Adair* should not be bound to pay the said sum of £2000 and interest until the 11th of April, 1863; and in the event of the company being ordered to be wound up before the 11th of April, 1863, then *Morrison* and *Adair* should not be bound to pay any money whatever for the said shares, except such of them as should have been disposed of. That in case in any years during the continuance of the agreement the company should not pay, or be in a position to pay, any dividend, then *Bush* should not be entitled to any interest on the £2000; and if the company paid less than 5 per cent., then *Bush* should be paid interest at the same rate.

The transfer of *Bush's* 400 shares was entered in the company's register of transfers, but the date of registration was not given. On the 11th of April, 1859, a return of changes and additions to the list of shareholders, signed by *Bush* and *Bere*, was made to the Joint Stock Companies Registry Office, in which the transfer of *Bush's* 400 shares was included, and also the other transfers by the other directors. Another return of the transfers by *Bush* and *Johnson*, signed by *Bere* and *Gould*, was made on the 7th of June; and another return, signed by *Bere* and Lord *Keane*, was made on the 25th of January, 1861. It was stated that the later returns were made because it was doubted whether the former returns were regular.

Morrison's name was not entered in the company's register of shareholders in respect of *Bush's* shares. Neither *Morrison*, *Adair*, nor Lord *Keane* were registered shareholders when they were appointed directors, nor did they execute the deed of settlement, or any deed of covenant as required by the 185th section; but there was evidence that from 1849 until the company was wound up no transferee was ever required to execute such a deed.

No certificate of approval by the directors on the transfer of *Bush's* shares could be found; but *R. B. Gould*, who was secretary to the company in 1859, and was afterwards managing director, deposed that he recollected the several transfers being brought before a board meeting of the company, and being approved of, and that he handed the certificate of approval to *Bush*; that he

recollected a solicitor, on behalf of *Morrison*, objecting to a £10 deed stamp on the transfer, as required by *Bush*, considering that £1 15s. would be sufficient. *Gould* thought that this meeting was held on the 11th of April, 1859; and said that he had forgotten to get the certificate of approval signed, and carried it to *Morrison's* house to get a signature, where Lord *Keane* or Major *Adair* signed it, and also Mr. *Bere*.

Morrison had never paid anything for the shares, and had left the country.

Bush and *Gould* both deposed that at the time they considered *Morrison* and the other new directors to be persons in a good position.

Mr. *Bush* stated in his evidence that he wished to leave the company on account of the disputes between the directors, and not in consequence of *Evans'* report, to which he did not attach much consequence. He did not, in 1858, consider the company insolvent or in difficulties, and thought that it was better off than it had been, inasmuch as the debts were reduced. He said that he had refused to sell his shares, except at par, and that, after some negotiation, the sale of his shares to *Morrison* and *Adair* was arranged by *Gould*, the secretary to the company, and that the agreement was prepared by the solicitors of *Morrison* and *Adair*. He denied that he was a party to any arrangement for getting out of the company to escape liability, and to keep from the shareholders the real facts of the case.

Another meeting of the company was held in 1860.

On the 10th of April, 1861, the company was ordered to be wound up. The executors of Mr. *Houldsworth* were, in 1868, placed on the list of contributories (see *Houldsworth* v. *Evans* (1)), and they now applied to have *Bush* placed on the list of contributories in respect of the 400 shares.

The Master of the Rolls held, that the transfer of *Bush's* shares was *bonâ fide*, but was ineffectual on account of irregularities (2).

(1) Law Rep. 3 H. L. 263.

(2) 1870. May 27.

LORD ROMILLY, M.R., after stating the facts of the case, continued:—

I think that the charge against Mr. *Bush*, that the transfer of these shares was not made *bonâ fide*, entirely fails. It is true that the conveyance was peculiar, and that under it no money has ever been paid to Mr. *Bush*, or ever

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Mr. *Bush* appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Amphlett*, Q.C., and Mr. *Roxburgh*, Q.C., for Mr. *Bush*:—

First, as to any actual fraud. When Mr. *Bush* joined this company was by Mr. *Bush* believed to be insolvent, but because he and the other directors who concurred with him could not manage the concern as they wished, and that, owing to the dissensions which ensued, and the proposed scheme of regeneration by Mr. *Morrison*, they were desirous of leaving the company.

will be, for the transferee has absconded, and is worth nothing; but I do not believe that this was the opinion which Mr. *Morrison*, or of any of the new directors, entertained at the time. Most of them were responsible persons, and the efforts which for nearly two years were made to restore and reinstate the credit of the company convince me that no one at that time despaired of the success of the company, and that these proceedings were not adopted solely for the purpose of leaving a sinking vessel. Whether the shares could at that time have been sold in the market at par is, I think, very doubtful; but I see nothing fraudulent or colourable in the transaction, although it is peculiar; and I shall have presently to comment for another purpose on the form of the transfer.

The shares, in substance, were transferred to Mr. *Morrison* at the price of £5 per share, provided that if the company did not pay £5 per cent. per annum the purchaser was not to pay the same price. It was true that Mr. *Morrison* was the transferee of many shares from the directors, but the transfers were *bonâ fide;* and he seems to have entertained a plan of uniting the *Agriculturist Cattle Insurance Company* with a banking scheme in which he was much implicated, and by this he hoped to benefit both companies. In truth, both failed, and Mr. *Morrison* has left this country deeply involved in this and other schemes; but I repeat that the investigation of all these matters has convinced me that the transfer was *bonâ fide*, and not made because

The other objection appears to be much more serious. [His Lordship then stated the circumstances of the transfer, and read the clauses of the deed of settlement.]

The transferee does not, as it would appear, become a shareholder until he has executed the deed. This he has never done. It is true that the transfer to *Morrison* is registered in the registers of transfers, but he is not registered as a shareholder. Moreover, the approbation of the transfer does not appear to have been given. If, as Mr. *Gould* states in his evidence, he went round to the directors, and got their signatures to the certificate of approval, that certificate has disappeared, nor was any entry of the approval ever made. Mr. *Gould* states that two of the signatures to this certificate were those of Lord *Keane* and Major *Adair;* but I think that their election as directors was irregular and informal, and that the provision as to the three months could not be dispensed with in that way; consequently any approbation by them was irregular and ineffectual. Moreover, an approbation to a transfer ought not to be given by an officer of the company obtaining signatures to a certificate of

pany it was in a worse position than when he left it, and yet he had so much confidence in it that he advanced considerable sums

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approval from the directors at their residences. The approval is a matter to be done with deliberation at the board room. It is of great significance in this case that no entry of any such approval appears in the books or records of the company, and that the certificate required by clause 189 of the deed of settlement is not forthcoming. The company are entitled to require more strict evidence of the fact of such approval, and of the due execution and delivery of the certificate, than has been given in this case.

Then as to the signature to the deed. [His Lordship then referred to 7 & 8 Vict. c. 110, s. 54.]

Now, the instrument by which the shares were transferred from Mr. *Bush* to Mr. *Morrison* has no reference to a deed at all, and accordingly Mr. *Morrison* has never executed the deed of the company, nor, for aught that appears from the corresponding and contemporaneous agreement, ever considered himself bound to do so, or bound by it. It seems, also, that Mr. *Bush* himself did not consider the transaction complete so far as he himself was concerned, for he still acted as director, and in that character he signed the return to the Registrar of Joint Stock Companies on the 11th of April, 1859, which contains the notice of the transfer of his shares. It is difficult not to see that much remained still to be done under the agreement before the transaction relating to the transfer of shares from Mr. *Bush* to Mr. *Morrison* was or could be considered final and complete. It is true that there are many cases in which the undue neglect of forms by directors has not invalidated a *bonâ fide* transfer of shares; but, so far as I have observed, this has always been in cases between strangers, who had not the power to compel the directors to observe the proper forms, or in cases where they were ignorant of, and had no means of ascertaining, the informality which had been committed. But the case is very different when, as here, the transfer is by a director himself, whose object is to retire from the company, and who has the power to see that everything is done according to due regularity, and still more different when the transfer is made to another person acting as director of the company; and it is something more than form when the director who makes the transfer does not follow the form prescribed by the Act of Parliament in that very case, and when, by reason of the omission so to do, the transferee becomes in no respect bound by the deed of settlement, the execution of which was, by the rules of the society, prescribed as a preliminary condition to his becoming a member of the company.

It was strongly argued before me that time would cure such an irregularity as this, or at least take away the right of complaining of it. And certainly in *Spackman's Case*, and in many other cases, I held that transactions acted upon were not to be ripped open after a long series of years of acquiescence, unless the case was tainted with fraud; but time in this case is really nothing. The transaction took place on the 9th and 11th of April, 1859, and the winding-up order was on the 10th of April, 1861, after the lapse of only two years. This certainly would not have prevented the application to put Mr. *Bush* on the list

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of money, besides taking many shares. If the company was to stop when 80 per cent. of the capital was lost, that ought to have been done before he joined it; but, taking credit for the goodwill of the business, it was solvent. The arrangement was, that the old directors should retire, and new directors, who were then supposed to be more wealthy, should come in. They did, in fact, carry on the business for two years longer, and there is no sign of any fraud: *Jessopp's Case* (1). The arrangement with *Morrison* was quite fair and *bonâ fide*, and no one at the time expected that he would become insolvent.

As to the formalities, in the case of a director purchasing shares consent cannot be necessary; and if it is necessary, there is evidence of the certificate having been given. Mr. *Bush* had a right to think that everything had been properly done; and in the absence of evidence to the contrary, such must be presumed. It is too hard upon him to be called upon ten years afterwards to prove that everything was properly done, and to answer all the objections that have been raked up. As to the non-execution of the deed by *Morrison*, he executed the deed of transfer, and that was quite enough to bind him. The form is certainly not the same as that given in the *Joint Stock Companies Act*; but that form is seldom used. At all events, the execution has been dispensed with by the company, and the company cannot now complain. *Morrison*

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of contributories. It is true that these proceedings were not taken till the end of last year; but then Mr. *Houldsworth* left this company in 1849, and believed himself to be wholly quit of it, though his executors found themselves in 1866 placed on the list of contributories by reason of informalities, not accompanied by fraud, committed upwards of fifteen years previously, and it was not, until finally fixed on the list by the House of Lords in 1868, that they had any interest in the matter, or had any cause to seek to make others contribute; and no laches can, I think, be reckoned against them previously to that time.

In this case the irregularities were greater than in some of the unsuccessful cases decided by the House of Lords in 1868. I think Mr. *Bush* never ceased to be a shareholder, and I think that the time which has elapsed cannot be relied upon by him as a protection against the matter being reopened. I am of opinion, therefore, that he must be put upon the list of contributories for the 400 shares intended to be transferred by him to Mr. *Morrison*. Of course I can give him no costs, but I shall not make him pay any, and the Applicants must have their costs out of the estate.

(1) 2 De G. & J. 638.

remained a director, was returned to the Registrar as a shareholder, was put on the list by the official manager in respect of these very shares, and the company cannot now turn round and say that *Morrison* is not a shareholder. *Straffon's Executors' Case* (1) and *Heward* v. *Wheatley* (2) shew that execution of the deed is not necessary when dispensed with by the company; and *Bargate* v. *Shortridge* (3) is a stronger case. The company cannot have both *Morrison* and *Bush* shareholders, and cannot by its own default acquire a right to elect between them.

Mr. *Jessel*, Q.C., and Mr. *Lindley*, for *Houldsworth's* executors:—

We say that Mr. *Bush* remains a contributory. If there are any irregularities, he must take the consequences, as he was a director, and it was his duty to see that there were none. The mere fact that *Morrison* was by mistake put on the list of contributories can make no difference. He has never paid any of the calls. There was obviously a scheme for removing the old directors and substituting new directors, and under such circumstances the new directors could not approve of a transfer to a man who has proved insolvent. Could *Morrison* have approved of the transfer to himself? A shareholder may not be affected by an irregularity, but a director must be: *Bargate* v. *Shortridge*; *Ex parte Brown* (4). As to the assent by the company, the other shareholders did not know what was going on.

As to the loss, it is perfectly clear that all the capital was lost, and that there were debts besides. The goodwill cannot be estimated in such a case; but even taking the goodwill at what it might be worth, four-fifths of the capital was certainly lost, and the company ought to have been stopped.

As to the approval in a company like this, it was especially the duty of the directors to see that the shareholders were solvent; and if Mr. *Bush* and the other directors neglected that duty, he must take the consequences. Even by *Gould's* evidence, the approval was subsequent and invalid.

Mr. *Bush* concealed from the shareholders that he was on the point of leaving the company. It was clear from *Evans'* report,

(1) 1 D. M. & G. 576.
(2) 3 D. M. & G. 628. 17 Jur 403.
(3) 5 H. L. C. 297.
(4) 19 Beav. 97.

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if they did not know it before, that all the capital of the company was gone, and instead of suppressing *Evans'* report and trying to escape, he ought to have wound up the company under the 191st clause of the deed. The whole transaction was merely a scheme to escape: nothing was paid at the time, or has ever been paid, by *Morrison* for the shares.

Mr. *Southgate*, Q.C., and Mr. *C. T. Simpson*, for the official manager.

Mr. *Amphlett*, in reply.

Dec. 19. Lord Hatherley, L.C.:—

The first question raised in this case is, whether Mr. *Bush*, who was undoubtedly a shareholder in this company in the years 1858 and 1859, should now be retained on the list; and that question must be determined by the preliminary inquiry whether he parted with his shares in April, 1859.

There are two branches of the case as it was argued against Mr. *Bush*. The first question is, whether the gentlemen who are now raising this inquiry, and who are shareholders in the company under very peculiar circumstances, having themselves been for many years off the list, and having been afterwards placed on the list by the decision of the House of Lords, are justified in asserting that Mr. *Bush* attempted to part with his shares in fraud of his duties as a director.

On that part of the case the Master of the Rolls, from whose decision the present appeal is brought, seems to have come to a clear and definite conclusion that the whole transaction, regular or irregular, was entered into *bonâ fide*. The Respondents, however, endeavoured to shew that the Master of the Rolls was in error as to that part of the case, and that the whole arrangement was tainted with *mala fides*. I will deal briefly with that part of the case, because, after full consideration, I entirely agree with the conclusion of the Master of the Rolls.

It seems that this unfortunate concern was continually in difficulties. So early as the year 1847 the question was raised whether

it ought not to be wound up, as having lost a large portion of its capital; and it has been argued that the company ought to have been dissolved under the provisions of the 191st clause at the time when Mr. *Bush* parted with his shares.

The company being formed for the purpose of insuring cattle, had evidently engaged in an enterprise of very considerable doubt and difficulty. Even as regards human life, matters have not yet arrived at such a state of certainty as to prevent heavy disasters resulting from mistakes made in the calculations with reference to premiums for insurance, and the like. As regards cattle, the whole matter was entirely new, and it is not at all wonderful that much greater mistakes should have been made, which might well bring any company to ruin.

One question, argued before Lord *Cottenham* in *Ex parte Spackman* (1), and again argued on the present occasion, is, whether the evidence of insolvency before the Court is so conclusive as to compel the Court to say that the company ought to have been wound up. No doubt the company was not able to pay a dividend, and had spent a large sum in advertisements, but it had gained a large business by that means. Unfortunately, a great deal of the business was unprofitable, which was not known when the case was before Lord *Cottenham;* and the question now is, whether, through *Evans'* report, this was so clearly known as to make it the duty of the directors to dissolve the company. [His Lordship then commented on the terms of the report:—]

It is very difficult to say decidedly what is the exact legal view which ought to be taken by persons who have a report of this kind presented to them. Of course one would rejoice to see everything laid plainly before the shareholders of the company. On the other hand, it would not be just for us, who have never been concerned with mercantile arrangements, to lay down as a fixed rule, that which I individually should be very glad to see established as a principle of mercantile morality, that every firm should publish all its accounts, as is done by the *Bank of England* and others. It is therefore difficult to say that, upon this report of Mr. *Evans*, the directors were to assume that four-fifths of the capital had been lost, or to say that they were bound to lay the report before the

(1) 1 Mac. & G. 170.

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shareholders under the penalty of being found guilty of fraudulent concealment if they did not. What they did was this, they set out all their accounts, and did not pretend to make a better statement than existed of their affairs, and they said distinctly that their affairs had been unfortunately such as to produce no dividend, which was a plain intimation to the shareholders that they had not been very successful. Soon after that the directors waived half their fees and took other steps by way of economy. I think there was a good deal in all this to alarm the shareholders; but, unfortunately, in these cases the shareholders are just as little disposed to have their affairs held forth to the public as the directors themselves. And I do not think that where the directors have made no false statement, and have not paid any dividend, and have told the company that they require a rearrangement of their system in order to make the matter profitable, I can hold that the fact of this report not being laid before the proprietors *in extenso* is a proof of any fraud whatever.

The next thing relied upon by Mr. *Jessel* was this: In 1858 and 1859 there were disputes between the directors, and it seems to have been thought desirable to get Mr. *Bere, Major Adair*, Lord *Keane,* and Mr. *Morrison,* who were directors of a bank or financial company, to join this company and become directors, and the shares of the existing directors appear to have been disposed of accordingly, and then these gentlemen were appointed directors a day or two before the general meeting of the company in 1859. Mr. *Jessel* has argued that this was a very strange and irregular proceeding. It is difficult, at this distance of time, to ascertain what were the reasons for this arrangement, but I cannot see any fraud in it, for the appointment of these new directors, after all, merely gave them a better chance of being elected by the shareholders at the general meeting.

The directors had suspended the rule which provided that no person should be elected a director unless he had been three months a shareholder; and it seems that, by a clause in their deed, they had power to do so. Then there was the meeting of shareholders, who must have been aware of what was done, and at that meeting the election of these directors was confirmed. There was an irregularity in this meeting, for General *Hope* took the chair,

although he had parted with his shares, but I cannot see where the fraud was. Then there was another meeting in 1860; what was done at that meeting is not very clear, but it seems that the directors were re-elected, and that appears to dispose of the case so far as fraud in the election of directors is concerned.

Then with respect to the transfer of Mr. *Bush's* shares. He says that he wanted to retire on account of the quarrels between the directors. [His Lordship then commented on the agreement between Mr. *Bush* and Mr. *Morrison*, and came to the conclusion that Mr. *Bush* intended *bonâ fide* to part with his shares, and to put the business into new hands, believing the new directors to be solvent, and that there was no fraud in the transaction.]

I now come to the actual transfer of shares, as to which the Master of the Rolls has found insuperable difficulty in holding that Mr. *Bush* has got rid of the shares, and, no doubt, there are difficulties in the case with reference to the provisions of the deed of settlement. This deed contains carefully prepared provisions to secure solvent shareholders. First, in order to part with the shares at all, the holder must obtain the consent of the directors. Then he must get a certificate of that consent, and then the transferee may be entered on the register of shareholders. Then, after that, there are provisions as to the person who becomes a shareholder executing a deed of covenant to abide by the rules and regulations of the company; and when that is done, there is a power to give to the shareholder an assurance that he is discharged wholly from all liability.

Now as to the first part of the transaction: I hold, upon the evidence, that leave was given by the directors; and I so far differ from the Master of the Rolls. [His Lordship then commented on the evidence to that effect.]

The certificate has been lost, which, no doubt, is very unfortunate; but, considering that the matter has been going on in the course of winding up for eight or nine years without Mr. *Bush* having any expectation of these proceedings, I do not wonder that that document should not have been preserved. But, in fact, it appears to me that the assent was given, although Mr. *Jessel* has raised a point upon that. He says the persons present seem to have been *Morrison*, *Adair*, Lord *Keane*, and *Bere*; and that *Morrison* and

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Adair, having an interest in these shares, could not properly give any assent in any way to what was here done. This raises the question whether or not a director who has an interest in shares which are transferred can give an assent to the transfer. I have to consider that question, assuming everything against Mr. *Bush*, as far as he has not proved the contrary, he being undoubtedly originally liable. It seems to me that it cannot be said that a director, who is himself to be a transferee of shares, is utterly incapable of giving his assent to the transfer. It might stop the whole business of the company, because a director wishing to take a transfer of shares in a company might be a person necessary for the completion of the board of directors on that day. There might very well be a state of things in which there could not be a full board without that director being present to give his assent to the transfer of the shares. No doubt the purpose for which the clause is inserted is to see that a responsible person has the shares, and to see, to a certain extent, that a man has not too many shares. But it is not like the case of a director entering into a contract for his own benefit; it is only that the transfer must be sanctioned by the directors, in order that improper persons may not get on the list. The director, to begin with, is not only on the list, but is a person in whom the company have such confidence that he is their director. The question is therefore reduced to the amount of the shares he may take. It seems to me that it is not open to the objection raised as to a person passing a vote for his own interest. There must be at least two directors against the one who is about to take the transfer, and he could not therefore carry it by his own vote. Next, he is a person already in the confidence of the company. Next, the transfer must be recorded not only in the transfer-book of the company, but in the public registry office. The whole thing being made plain and clear to the company, and assuming that it is not a thing done for the simple purpose of fraud, which of course in that case would be discovered, in all probability, during the current year, and if the matter goes on to the next yearly meeting, and the shareholders having had full opportunity of expressing their opinion as to whether or not this was a reasonable and proper thing to be done on the part of the directors, and of expelling them if their conduct was im-

proper, the thing cannot after that be disturbed. I must therefore hold that the transfer was made, and that it was properly assented to.

However, Mr. *Jessel* said further, that the time of transfer does not appear; and regard being had to Mr. *Bush* having acted on the 11th of April as a director, that there is evidence (and the Master of the Rolls seems to have given way to that argument) to shew that he did not regard the thing as done and completed. But the circumstance of the agreement having been made, and of the assignment having been afterwards, although not entered in the share register, duly entered in the public record, which was open to all the company and to all the creditors of the company, is so far a full recognition of the shares having been passed from one person to another, and the proper assent having been given, that it is too late after all that had taken place—a year having elapsed, and a general meeting having taken place since that year elapsed—to say that the transaction was wrong, and that the directors were not authorized to recognise the transfer. The transaction might not have been regarded as fully and entirely completed until the difficulty about the stamp was cured; but when the difficulty was cured and the return was subsequently made to the registry, then the whole thing would be properly treated as completed.

Then, supposing the transfer of the shares to have been authorized, we have to consider the execution of the deed of transfer.

The 185th clause of the deed of settlement is certainly worded in a very peculiar manner, but I cannot hold upon it that a person is not a shareholder, unless a deed of covenant has been executed by him; and for the reason that it is to be done at the request of the directors. I apprehend that Mr. *Bush* would have had a right to file his bill against Mr. *Morrison*, to insist upon the execution of the deed; but, on the other hand, as between the company and the shareholders, the persons charged with this duty are the directors. The Master of the Rolls has said that he thinks it is peculiarly important to hold that every one of these provisions must be carefully complied with, because the parties concerned were directors. It is quite true that Mr. *Bush* was a director when he dealt with the shares, but when he had parted with his shares he was no longer a director or shareholder, and he had no control

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over the matter beyond having the right to file a bill. The persons who were to see that within a month the deed was executed were the directors of the company, and the duty of seeing the deed executed was thrown upon them, and not upon Mr. *Bush*.

That being so, it seems to me impossible to contend that Mr. *Bush* is not released. He has been permitted by the directors, acting on behalf of the company, to assign his shares; he has actually assigned and parted with them, and has vested them in a person to whom the directors might immediately apply and say, that if within one month that person did not comply with the deed he would forfeit his shares, which I think they had a right to say. If, instead of obtaining the execution of the deed, the agents of the company are content to let this person take a position as a shareholder—if they enter the transfer of the shares to him, and if the company take no notice of this transaction whatever, and make no inquiry as to whether the deed has been executed or not; and if the company go on, and hold their meetings for another year, with full notice to the Registry Office of this transfer, can they afterwards, at the end of two years, turn round and say that Mr. *Bush* is responsible, because the directors have not required the transferee to execute the deed, though they have dealt with him as a shareholder. But it is said that Mr. *Bush* should have required this to be done, if he wanted to be liberated from the company. That depends upon the 190th clause of the deed of settlement:—[His Lordship read the clause.]

Upon this it is said that the assigning shareholder is to be free when the other has executed the deed; and from that the inference is drawn that he is not to be free until then. If Mr. *Bush* had been well advised, his wiser course would have been to compel the execution; but I cannot hold that, simply because it is said that when a man has executed this deed he shall thereupon become a shareholder; therefore, if the company abandon their portion of the duty in requiring the deed to be executed, the former shareholder still remains liable.

I have carefully weighed the observations made by some of the learned Lords in giving judgment in *Spackman* v. *Evans* (1), upon the extreme anxiety of the shareholders to secure the responsi-

(1) Law Rep. 3 H. L. 171.

bility of those who should be associated with them in their enterprise; but if I find, as I have found upon the evidence, that the assignment was permitted by the directors, if I find that the certificate of that permission was possessed by Mr. *Bush*, and if I find the only remaining flaw to be, that a duty which was distinctly imposed upon the directors has been omitted, I cannot say that that omission on the part of the directors is one which ought to prejudice Mr. *Bush* or prevent his maintaining, after the interval of time which has elapsed, that he has discharged himself from the obligations under which he was held anterior to his making this transfer.

The result is, that I entirely agree with the Master of the Rolls as to the *bona fides* of the transaction; but I differ from him, as I do not think that the defects in the transfer preclude the Court from saying that the transfer ought to have that effect which was *bonâ fide* intended; and I am not able to say that Mr. *Bush* ought to be placed on the list of contributories.

Then, with regard to the question of costs. As this is an application by Mr. *Houldsworth's* executors, and as there has been so much irregularity, partly during Mr. *Bush's* time, the records being so imperfect, that we have to depend upon parol evidence where there should have been no doubt or difficulty, the burden has been partly brought by Mr. *Bush* on himself; and I cannot say that Mr. *Houldsworth's* executors were not justified in having the matter fully sifted. That being so, I can give no costs in the matter. Of course the official manager will have his costs.

Solicitors for Mr. *Bush*: Messrs. *Warry, Robins, & Burges.*
Solicitor for Mr. *Houldsworth's* Executors: Mr. *J. E. Fox.*
Solicitors for the Official Manager: Messrs. *Horn & Murray.*

L. C.
1870
Dec. 22.
1871
Jan. 11.

In re EMPIRE ASSURANCE CORPORATION.

CHALLIS'S CASE.

SOMERVILLE'S CASE.

Company—Transfer of Business—Acceptance of Shares.

A company agreed, under circumstances which made it doubtful whether the agreement was binding on the shareholders, to transfer its business to a new company, one of the terms of the agreement being, that each shareholder in the old company should become a shareholder in the new company. The shareholders in the old company were accordingly registered as having transferred their shares to the new company, and share certificates in the new company were sent to each shareholder in the old company. Both the companies were afterwards wound up:—

Held (reversing the decision of *Stuart*, V.C.), that a shareholder who had acknowledged the receipt of the certificates, and had retained them, was a shareholder in the new company:

Held (affirming the decision of *Stuart*, V.C.), that a shareholder who had taken no notice of the communication, and had done nothing in relation to the agreement, was not a shareholder in the new company.

THE *City and County Assurance Company, Limited*, was registered in 1863. The objects of the company were by its memorandum of association declared to be to insure against fire and on lives, and to effect any insurance of any kind, and to acquire the business of any other insurance company by purchase or otherwise. By the articles of association the directors had power to transfer and sell the business of the company, or amalgamate with any other company of a like nature; and the shareholders had power to dissolve the company.

The *Empire Assurance Corporation, Limited*, was registered in 1865. The objects of the company were by its memorandum of association declared to be the purchase of the business of other assurance companies, and to carry on the business of life assurance, of assurance against sickness, and other assurances; and also the business of a loan company and of a guarantee society.

The *City and County Company* had incurred losses, and an agreement, dated the 20th of September, 1866, was made between the directors of that company and the directors of the *Empire Corporation* to the following effect:—That the business and assets of

the *City and County* should be transferred to the *Empire;* that upon the confirmation of the agreement by a general meeting of the *City and County*, notice of the transfer should be sent to the policy-holders; that the shareholders of the *City and County* should be entitled to and allotted two shares of £10 each in the *Empire*, with £2 credited as paid on each such £10 share for every share in the *City and County* with £4 paid thereon; and the *Empire* undertook to pay £2000, then due by the *City and County*, and to discharge all the liabilities of the *City and County*. To that agreement the seals of both companies were affixed; and the £2000 was paid.

A general meeting of the *City and County* was held on the 9th of October, 1866, at which the agreement between the directors was ratified and confirmed by the shareholders present.

On the 20th of December, 1866, the following printed papers, duly filled up, were sent to each shareholder in the *City and County*:—

"*Empire Assurance Corporation, Limited.*

"*London,* 186 .

"Dear Sir,—I have the pleasure to inclose you certificates for shares allotted to you in the *Corporation*, for which please sign and return me the accompanying form of receipt.

"I am, &c."

"*Empire Assurance Corporation, Limited, London.*

"I beg to acknowledge receipt of certificate for shares numbered from to , issued by the above company in my name, bearing date the 9th day of October, 1866."

"*The Empire Assurance Corporation, Limited.*

"This is to certify that the registered holder of this certificate is the proprietor of the share No. in the *Empire Assurance Corporation, Limited*, subject to the memorandum and articles of association of the said company.

"Given under the common seal of the company this 9th day of October, 1866.

"*G. W. Gidley Lake,* Manager.

"No share can be transferred except by deed duly registered in the books of the company."

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CHALLIS'S CASE.

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Mr. *J. W. Challis* had ten shares in the *City and County;* he exchanged his *City and County* certificates for twenty *Empire* certificates, which he retained; and he signed and returned the receipt, adding the words "in exchange for certificates for ten shares in the *City and County Assurance Company, Limited.*" He was present at the meeting of the 9th of October, 1866, and at a meeting of the *Empire* in 1867.

Mr. *Fordyce* had ten shares in the *City and County.* He also exchanged his certificates, and signed and returned the receipt, but attended no meeting.

Mr. *Somerville* had 100 shares in the *City and County.* He received the letter, &c., and retained certificates for 200 shares in the *Empire,* but neither signed nor returned the receipt. He attended one meeting of the *Empire.*

In the register of transfers of the *City and County,* Mr. *Challis,* Mr. *Fordyce,* and Mr. *Somerville,* were entered as having transferred their shares to the *Empire;* and a corresponding entry was made at the Registry Office.

None of them dissented, or attempted to repudiate, before the 13th of April, 1867, when a resolution was passed for winding up the *City and County* voluntarily. In May, 1867, an order was made to continue the winding-up under the supervision of the Court.

In May, 1867, an order was made for winding up the *Empire.*

The Vice-Chancellor *Stuart* ordered the names of Mr. *Challis,* Mr. *Fordyce,* and Mr. *Somerville* to be struck off the list of contributories to the *Empire;* and the official liquidator appealed.

Sir *Roundell Palmer,* Q.C., Mr. *Dickinson,* Q.C., and Mr. *Brooksbank,* for the Appellant, contended that the contract between the two companies was not voidable; but even if it was, these shareholders had had distinct notice that they were shareholders in the *Empire,* and had accepted that position. In *Ex parte Bagshaw* (1) the shareholder had not accepted; so in *Clinch* v. *Financial Corporation* (2). *Alabaster's Case* (3), and *Stace and Worth's Case* (4), were altogether different, the constitution of the companies being so very unlike, that an amalgamation could only

(1) Law Rep. 4 Eq. 341.
(2) Ibid. 5 Eq. 450; 4 Ch. 117.
(3) Law Rep. 7 Eq. 273.
(4) Ibid. 4 Ch. 682.

have been effected by Act of Parliament; but this arrangement was within the powers of the directors: *Hare's Case* (1). The businesses of the two companies were very much alike, and that of the *Empire* was the more extensive, so that there was no reason why the transaction should not be valid. Every shareholder was informed of what had been done, and as the *Empire* was then supposed to be prosperous, the bargain was so much to the advantage of the shareholders in the *City and County* that they would naturally accept.

Mr. *Greene*, Q.C., and Mr. *Cracknall*, for the contributories:—

We contend that the agreement was *ultrà vires*, and remained incomplete. The shareholders in the *City and County* had never intended to insure against sickness, or to do many things which the *Empire* undertook. The company could not bind the individual shareholders; and we contend that they have not bound themselves. As to *Somerville*, he cannot be held to have undertaken these liabilities merely because he has received a packet of printed papers and has taken no notice of them; there must be a distinct assent: *Higgs' Case* (2). We say that the contract is void; therefore, unless *Fordyce* and *Challis* have taken their shares independently of the contract, they are not bound; but then they would be liable for the whole sum, which the others have not ventured to contend. If the agreement is void, the whole thing is void, as the shares were only taken in pursuance of the agreement.

Sir *Roundell Palmer*, in reply.

LORD HATHERLEY, L.C.:—

As regards the cases of Mr. *Challis* and Mr. *Fordyce*, it seems to me that they are concluded by *Hare's Case* and by the principles laid down in *Lawrence's Case* (3), *Kincaid's Case* (4), and the case of *Oakes* v. *Turquand* (5). What took place between the two companies was this: An arrangement was made by which one company agreed to part with the whole of its property to the

(1) Law Rep. 4 Ch. 503.
(2) 2 H. & M. 657.
(3) Law Rep. 2 Ch. 412.
(4) Ibid. 420.
(5) Law Rep. 2 H. L. 325.

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CHALLIS'S CASE.

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other, and the other agreed, on that being done, to indemnify the first-mentioned company against its debts; and further, to give to every shareholder in that company an opportunity to become a shareholder in the other company on certain terms. The opportunity was given for two reasons: first, on the actual terms of the agreement, and, secondly, because the shareholders could not be compelled so to exchange their shares, or to become proprietors in the new company, which was totally different from that to which they originally subscribed, unless there was something in the deed giving the directors power to compel them so to do. Mr. *Challis*, knowing of the arrangement which had been made, or purported to be made, between the two companies—whether validly or not may be a question—and knowing that one of the terms of that arrangement was that he, handing over his own shares, would get shares in the new company, which might or might not be considered to be valuable, thinking it at that time to be most beneficial to enter into the arrangement, determined to avail himself of the offer to exchange his shares in the original company for shares in the new company, to which, by the arrangement, he was thus entitled to belong.

I cannot distinguish this in any way from *Hare's Case* (1), because in *Hare's Case* also doubts and difficulties as to the validity of the amalgamation arose, and proceedings were taken for the purpose of having it declared that the arrangement was invalid. It is true that *Hare* had sent a letter to express his assent to the whole arrangement, and did specifically apply for shares, whereas neither Mr. *Challis* nor Mr. *Fordyce* actually applied for shares; but the company in this case did not ask the shareholders for their assent or dissent, though they sent to each shareholder documents which plainly and distinctly informed him of his position. [His Lordship then read the letter, the receipt, and the certificate, and observed that the shareholders must have had some previous knowledge of the amounts paid up.]

Mr. *Challis* signed and returned the receipt, adding words which I think rather weaken his case, for he recognises the whole transaction as a complete and definite contract between him and the *Empire*, to which he sent the documents. I cannot distinguish

(1) Law Rep. 4 Ch. 503.

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that case from the case of *Hare*, who was under exactly the same impression, that an arrangement had been come to between the two companies, by which he could take a benefit, if he chose to take it, not that he was to have a compulsory burden imposed on him.

The contract entered into was complete and entire, as in *Hare's Case* (1). He might have believed that the whole amalgamation would go on exactly in the mode in which it had been proposed. There might have been difficulties about that, and invalidity about that part of the case; but though that might entitle him, if the company was a going concern, to be relieved from this contract on the ground of misapprehension, still, if that was not done before the winding-up order was made, the creditors have a right to intervene, as in other cases, for they can know nothing of the motives which induced him to take the shares. All the creditors can know is, that he agreed to take them. If he has agreed to take them, then, whatever the circumstances were which induced him to enter into the agreement, he cannot say, after the winding-up, that he will be released from the contract which he had *de facto* entered into.

I see no substantial difference as to Mr. *Fordyce's* case.

But as to *Somerville's* case there is a difference. He had these documents sent. If he had returned the receipt, then the receipt alone would be a sufficient recognition of the engagement being entered into by him. I must take him to have known that an arrangement had been come to between the companies, under which he would have been entitled to take these shares, had he thought fit. But though he had them sent to him, there was no acceptance by him, and I cannot find a contract by him in any way. The mere circumstance of a person's name being written down on the register has never been held to bind him, if he has never taken any step which authorized the insertion of his name on the register.

Somerville has not authorized anybody to put his name down to anything except the *City and County Company*. He knew that he had an opportunity of taking shares in the *Empire* if he thought fit. But he did nothing; he remained silent, and did not accept the bargain. He was simply told that his name was written down, taking it for granted that he had assented to the bargain. But no

(1) Law Rep. 4 Ch. 503.

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authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorized, cannot fix you with the heavy liabilities which shares in a joint stock company would create. We are all subject to have things sent to us at our houses by persons with whom we have nothing whatever to do, and I think that the mere writing to this gentleman, telling him that something had been done, was not enough to fix him. Therefore I must vary the Vice-Chancellor's order by directing that *Fordyce* and *Challis* are to be placed on the list of contributories, and affirm the order as far as it regards the exemption of *Somerville*. I think it is a case where the costs of all parties may fairly come out of the estate, for two reasons—first, that it is a representative case, as I understand; and then, that it is between parties in part succeeding and in part not succeeding.

Solicitor for the Official Liquidator: Mr. *A. Pulbrook*.
Solicitors for the Contributories: Messrs. *Kimber & Ellis*.

L. C. 1870

July 29; *Aug.* 2.

Ex parte MANCEAUX.

Patent—Similar Invention—Second Patent.

Where the Law Officer has reported that part of an invention for which a patent is sought is identical with part of an invention which is the subject of an existing patent, a second patent will not, except under special circumstances, be granted for that part, although the validity of the first patent is disputed.

IN this case a reference had been made to the Law Officer to report whether, regard being had to the grant of letters patent to the agent for *Le Baron*, letters patent ought to issue to *Manceaux* for improvements in breech-loading fire-arms and in cartridges for the same, as reported (1); and the Attorney-General accordingly certified, on the 14th of July, 1870, that, in his opinion, letters patent ought not to issue to *Manceaux* in respect of so much of his alleged invention as related to the ejection of the empty cartridge case.

(1) Law Rep. 5 Ch. 518.

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It appeared that the provisional specification of *Le Baron's* patent did not include the part for which *Manceaux* wanted letters patent, though the complete specification did include that part; also that, in the interval between the filing of the two specifications, *Le Baron* lodged in the Belgian Patent Office drawings which shewed the improvement.

Mr. *T. Aston*, for the applicant, said that the first patent was void, inasmuch as the complete specification went beyond the provisional specification. The part for which the present application was made was not included in the provisional specification. The Attorney-General declined to go into this question; but whether he was right or not, this Court is bound to do so. We only ask to have the seal affixed to this patent, and let the parties litigate the question. The first patentee will then have to disclaim that portion of his patent, or else his whole patent will be void. At all events, in a case of doubt like this, the Court will not deprive the applicant of the advantage he claims, but will give him the patent and leave him to maintain it.

Mr. *Freeling*, for *Le Baron*, said that the complete specification was only for an improvement on the provisional specification. Before *Manceaux* applied for his patent, *Le Baron* had lodged a full description in *Belgium*, and *Manceaux* might have seen it.

Aug. 2. LORD HATHERLEY, L.C.:—

I have felt considerable difficulty in determining what ought to be done in this case. *Le Baron* lodged a provisional specification, which undoubtedly did not include this particular part of the invention. Afterwards, and before the complete specification was deposited, it is clear that there was a drawing lodged in *Belgium*, which shewed this improvement; and there is much doubt whether this is an improvement growing out of the original invention, and, consequently, how far it would be protected. In the case of *Ex parte Bates and Redgate* (1), where both parties were *bonâ fide* inventors, I held that a second patent ought not to be granted for

(1) Law Rep. 4 Ch. 577.

L. C. 1870 *Ex parte* MANCEAUX.

the same invention, inasmuch as one objection to granting a second patent is, that the question is not between the patentees only, but affects the public, who will be at a loss to know with whom to deal. The invention is made public for the express purpose of enabling every one to make use of it, but when there are two patents for the same invention, what is a person to do who wants to use it? In some cases, to avoid injustice, the patent has been granted putting the parties under terms, where the question could not otherwise be tried, but in this case there is considerable risk of doing injustice by granting a second patent.

It is clear that this invention has been made public in *Belgium*, and the parties are therefore not in the position of original inventors; nor is there any case of fraud; nor was the first patentee a servant of the applicant. I must decline to affix the Great Seal to this patent, except so far as it is not objected to. There will be no costs given to either side.

Solicitors: Messrs. *Johnson & Weatheralls;* Mr. *Appleyard.*

L. C. 1871 *Feb.* 10.

Ex parte SCOTT & YOUNG.

Patent—Similar Invention—Mala fides.

Where a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, and subsequently filed a complete specification and obtained letters patent:—

Held, that, under the circumstances, the Great Seal might be affixed to the letters patent for the servant's invention, and that the letters patent might bear the date of his provisional specification.

THE Petitioners in this case, *G. Scott* and *H. Young*, on the 2nd of July, 1870, left at the Patent Office a Petition for a grant of letters patent for an improvement in water-meters, and also left a provisional specification. On the 19th of December they applied for letters patent, but were opposed by one *Pocock*. They then presented this Petition to have the Great Seal affixed to letters patent for their invention, and to have the letters patent dated as of the date of their provisional specification.

Pocock opposed on the ground that he had, on the 17th of August, 1870, left a Petition and provisional specification with respect to a similar invention, had afterwards filed a complete specification, and had, on the 9th of December, obtained letters patent for his invention.

It appeared that *Scott* had been in *Pocock's* employment, and that *Pocock* was aware, on the 13th of May, that *Scott* was working upon a new meter, the particulars of which, however, were not known. *Scott* afterwards left *Pocock's* employment and joined *Young*. In July *Scott* wrote to *Pocock*, offering to dispose of his invention, and proposing an interview on the 3rd of August to explain it. *Pocock* postponed the interview, alleging that he had a previous engagement; but in an affidavit he stated that his real reason was that he wished to perfect his own invention, and have a model made of it before seeing *Scott's* invention. He also deposed that he hit upon this invention between the 30th of July and the 3rd of August; and his patent agents deposed that they had seen drawings of his invention and a model before the 4th of August. The evidence is further stated in the judgment of the Lord Chancellor.

Mr. *T. Aston*, in support of the application, contended that there had been fraud by *Pocock*, who was, in fact, trying to use the invention of his servant: *Samuda's Case* (1).

Mr. *Cosens-Hardy*, for *Pocock*, contended that *Ex parte Bates & Redgate* (2) applied; and that *Pocock*, on the evidence, had made an independent discovery, and ought to be left in the enjoyment of his patent: *Ex parte Yates* (3); *Ex parte Manceaux* (4).

Lord Hatherley, L.C.:—

The case of *Ex parte Bates & Redgate* does not apply where the course of dealing has been such as I find here. I hold to all that I said in that case—that a person cannot, by filing a provisional specification only, not choosing to file a complete specification, obtain anything more than a right to be protected against

(1) 5 L. T. 141; Hindm. Pat. 534.
(2) Law Rep. 4 Ch. 577.
(3) Law Rep. 5 Ch. 1.
(4) Ibid. 5 Ch. 518; *ante*, p. 272.

L. C. 1871 *Ex parte* Scott & Young.

the consequences of his own publication, and does not obtain a right to priority over any other person who has independently and originally hit upon the same idea, and, in anticipation of the other, first gives the world the benefit of it.

The case before me is one where the connection of master and servant existed between the parties, and where there did exist also most abundant means for the master to become acquainted with what his servant had invented. [His Lordship referred to the evidence on this point, and continued:—] The master says it only occurred to him to hit upon the same invention on the 30th of July, and he would not meet the servant on the day suggested because he wished to shew to his patent agent what his invention was. But it is curious that he was so anxious to secure the priority of his invention before he had an opportunity of seeing his servant's drawings. However, I do not lay undue stress on that, and I give weight to the evidence of the agent, that he saw that thing, or something like it. In the history of patents there are many cases of *bonâ fide* inventors hitting on the same thing about the same time, the reason probably being that the want of some such invention is felt by several inventors about that time, and so it often happens that an original inventor is shut out of the profits of his invention. That has been urged as an objection to the patent laws; but the answer is that, as far as the world is concerned, it can only treat him who first publishes his invention as the benefactor of the public, and in a case of honest discovery on both sides the law protects the first publisher. But, on the other hand, where we find the parties in close contact, and a master negotiating with his servant for the purpose of purchasing his patent, and then putting off an engagement on a false excuse, in order, as he now alleges, that he might shew to several witnesses an invention similar to what his servant may have invented, it would be very hazardous to apply the doctrine of *Ex parte Bates & Redgate* (1).

The only thing that at all raised a question in my mind is, that there was a time when the Petitioners might have opposed the sealing of their opponent's patent. They knew of his claim, and that it was made later than their own, but I do not consider that

(1) Law Rep. 4 Ch. 577.

that ought to exclude them from the benefit of having their patent sealed under all the circumstances of the case, for up to that time the applicants had not got the complete specification, as in *Ex parte Bates & Redgate* (1), and had no means of knowing to what extent the other patent might go. This case is too full of suspicion to prevent my granting the seal to the present applicants. Throughout the evidence there is the gravest suspicion of information derived by *Pocock* as to the nature of the applicant's invention. [His Lordship then commented on the evidence.] I think, therefore, that the proper course is to give the Petitioners the benefit they claim. In *Ex parte Bates & Redgate* there was a *bonâ fide* inventor applying and giving to the world the benefit of his invention, without raising those suspicions which I certainly feel here. The letters patent of the applicants must be sealed, and dated as of the date of their provisional specification, and the objector must pay the costs of his opposition.

Solicitors: Messrs. *Bower & Cotton;* Mr. *B. E. Greenfield.*

(1) Law Rep. 4 Ch. 577.

L. JJ.
1870
Dec. 19.
1871
Jan. 11, 12.

CALDWELL *v.* CRESSWELL.

Will—Condition—Apportionment—Condition not Apportionable—Exoneration.

A testator directed that a specific sum of £10,000, to which he was entitled, should be applied in paying off a charge on his *B.* estate, if established; and that in case it should be so applied, then a charge of £13,000, to which his *D.* estate was liable, should not be raised thereout, but out of his *B.* estate. After his death, the charge on the *B.* estate having been established, the £10,000 was applied in paying it off. Subsequently, his other personal estate having proved insufficient for payment of his debts, a decree was made for refunding the £10,000 out of the *B.* estate; but it was disputed whether the whole of it was wanted for payment of debts:—

Held (affirming the decision of *Malins*, V.C.), that the disposition in favour of the *D.* estate was upon a condition which was not apportionable; and that, unless the *B.* estate got the full benefit of the £10,000, the owners of the *D.* estate had no title to throw any part of the £13,000 on the *B.* estate.

THIS was an appeal by the Plaintiffs from a decree of Vice-Chancellor *Malins* dismissing their bill.

The Plaintiffs were mortgagees of the life interest of *Thomas E. Cresswell*, deceased, in lands called in the pleadings "the *Devon* estate," and the bill was filed to obtain payment out of another estate, called "the *Bibury* estate," of sums paid out of the rents of the *Devon* estate for interest on a charge of £13,000.

In 1814, *Estcourt Cresswell* was entitled in fee simple in possession to "the *Bibury* estate," subject to a question whether *Thomas Fry*, the husband of his deceased daughter, was not entitled to a sum of £10,000 under a provision contained in the settlement made on the first marriage of *Estcourt Cresswell*, all other limitations in which settlement had come to an end. *Estcourt Cresswell* was at the same time entitled in fee to the *Devon* estate, subject to a life estate vested in the above-named *Thomas Fry*, and to a charge of £3000 in favour of Sir *John* and Lady *Guise*.

In the spring of 1814, *Estcourt Cresswell* agreed to sell a part of the *Bibury* estate to Lord *Sherborne* for £20,000; and it was arranged that Lord *Sherborne* should retain out of the purchase-money £10,000, to indemnify him in case it should be ultimately decided that Mr. *Fry's* charge was subsisting.

By indenture dated the 7th of September, 1814, the unsold part of the *Bibury* estate was limited by *Estcourt Cresswell* (subject to the £10,000 charge, if subsisting) to himself for life, with remainder to trustees for the term of 1300 years, with remainder to *Richard E. Cresswell* the elder for life, with remainder to *Richard E. Cresswell* the younger for life, with remainder to his first and other sons surviving in tail, with divers remainders over. The trusts of the term were to raise the £3000 charge in exoneration of the *Devon* estate, and if the £10,000 proved not to be a subsisting charge on the *Bibury* estate, then to raise £10,000 and pay it to the executors, administrators, or assigns of *E. Cresswell.* The settlement also contained a power to *E. Cresswell* to charge the estate with £5000.

By indenture of even date, *Estcourt Cresswell* charged the *Devon* estate with the payment of £13,000 for the younger children of *R. E. Cresswell* the elder, after the decease of the survivor of *Estcourt Cresswell* and *Thomas Fry. Estcourt Cresswell,* after this, paid off the charge of £3000 payable to Sir *John Guise.*

Estcourt Cresswell, by will, dated the 21st of February, 1821, devised certain lands to trustees, upon trust, among other things, to raise £5000, the interest of which was to be paid to *Thomas E. Cresswell* for life; and he gave to trustees "the sum of £10,000, due and owing from Lord *Sherborne* to me on his purchase, upon trust to pay and apply the same sum in satisfaction and discharge of the contingent claim of *Thomas Fry* upon my estate in *Bibury* aforesaid, in case the same should be established and become an actual charge thereon; and in case such claim should not be established, and the said sum of £10,000 should not be applicable to the discharge thereof, then I direct that the said sum of £10,000 shall sink into and be considered as part of the residue of my personal estate. And I do hereby direct that the sum of £3000, lately by me paid to the representatives of the late Lady *Guise,* and also the sum of £5000 which I have a power of appointing and raising out of my estates at *Bibury* aforesaid, shall not be raised or paid thereout, but shall sink into the freehold of such estate, for the benefit of the persons entitled under the settlement aforesaid. And I do hereby declare that, in case the said sum of £10,000 should be so applied in exoneration of my said settled estate at

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Bibury aforesaid, then the sum of £13,000, charged upon and payable out of my reversionary estates in *Devonshire*, shall not be raised or chargeable thereon, but that the sum of £13,000, by my said settlement directed to be raised for the portions of the younger children of my said son *Richard E. Cresswell*, shall be raised out of and be charged upon my said settled estates at *Bibury* aforesaid." And the testator devised his reversion in the *Devon* estate to trustees, in trust for *Thomas Estcourt Cresswell* for life, with divers remainders over.

Estcourt Cresswell died on the 4th of July, 1823.

By a decree made on the 5th of December, 1829, in a suit of *Fry* v. *Lord Sherborne* (1), it was declared that Mr. *Fry's* charge was raisable with interest. This charge was accordingly paid by means of the £10,000 retained by Lord *Sherborne*.

On the 8th of February, 1846, *Thomas Estcourt Cresswell* mortgaged his life interest in the *Devon* estate to the Plaintiffs. *Thomas Fry* died in March, 1860; and the Plaintiffs, in December of that year, filed a bill (*Caldwell* v. *Ellison*) to enforce their security, and a receiver was shortly afterwards appointed.

In April, 1860, the trustee of a term created by the second settlement of the 7th of September, 1814, filed his bill to have the £13,000 raised. The same was accordingly raised by mortgage of the *Devon* estates, and the receiver in *Caldwell* v. *Ellison* kept down the interest on the mortgage out of the rents, up to the death of *Thomas Estcourt Cresswell* in January, 1867.

The object of the present bill was to have the sums so paid for interest made good out of the *Bibury* estate.

A long course of litigation, commencing in 1834, had proceeded as to the estate of *Estcourt Cresswell*, into the particulars of which it is unnecessary to enter. It is sufficient to say that it was established that the personal estate of *Estcourt Cresswell*, exclusive of the £10,000 payable by Lord *Sherborne*, was insufficient for payment of his debts; and by a decree made on the 18th of January, 1867, in a suit of *Thomas* v. *Cresswell*, directions were given for raising the £10,000 out of the *Bibury* estate, on the ground that the money payable by Lord *Sherborne* had been improperly applied in exonerating that estate, as the testator's other

(1) 3 Sim. 243.

personal estate was insufficient for payment of his debts. The Defendants in the present suit, who were the persons interested in the *Bibury* estate, alleged that it clearly appeared from the proceedings in the administration that the whole of the £10,000 was wanted for payment of debts. The Plaintiffs, on the other hand, though they admitted that a substantial part of that sum was wanted for debts, denied that the whole of it was required.

Vice-Chancellor *Malins* considered that it was established, by the proceedings in the administration suit, that the whole of the £10,000 was wanted for payment of *Estcourt Cresswell's* debts; that the direction to exonerate the *Devon* estate, therefore, became inoperative, and the Plaintiff's case failed. His Honour accordingly dismissed the bill, adding that, even if the money was not wholly required for debts, the result would be the same, for that in His Honour's opinion, according to *Fazakerlay* v. *Ford* (1), there could not be an apportionment.

Sir *Roundell Palmer*, Q.C., Mr. *Schomberg*, Q.C., and Mr. *Cookson*, for the Appellant.

Mr. *Shapter*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for the owners of the *Bibury* estate.

Mr. *Pearson*, Q.C., Mr. *Rawlinson*, and Mr. *George Lea*, for other parties.

The case made by the Plaintiffs was, that the will in substance bequeathed in exoneration of the *Devon* estate the charge of £3000 and £10,000 on the *Bibury* estate; and that, so far as those charges were not wanted for the payment of debts, effect must be given to that bequest. It was contended, therefore, that whatever rents of the *Devon* estate had been applied in paying interest on so much of the charges on that estate as would thus have been paid off, ought to be refunded to the Plaintiff, as mortgagee in possession of the life interest in the *Devon* estate. On behalf of the Defendants, it was contended that there was no bequest of the *Bibury* charges for the purpose of exonerating the *Devon* estate, but an attempt to create a fresh

(1) 4 Sim. 390.

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charge on the *Bibury* estate for that purpose, which charge could only be effectual by virtue of the doctrine of election; and that, as the *Bibury* estate did not get the benefit of the direction for merging the charges upon it, the disposition in favour of the *Devon* estate failed; and that this was the case, even if (which the Defendants denied to be the fact) the whole of the charges on the *Bibury* estate were not wanted for payment of debts, for that the disposition in favour of the *Devon* estate depended on a condition which could not be apportioned. On this point *Fazakerlay* v. *Ford* (1) was referred to. The following points were also taken by the Defendants: that the charge on the *Devon* estate was liable to debts *pari passu* with that on *Bibury;* that the Plaintiffs were bound by the *Statute of Limitations* and by laches; and that the Plaintiffs had no case for charging against the inheritance of the *Bibury* estate moneys which ought to have been recovered from the person for the time being in receipt of the rents. Many authorities were referred to on these latter points, but the Court expressed no opinion on any of them.

SIR W. M. JAMES, L.J.:—

Many points, some of which are of considerable interest and importance, have been raised and discussed on this appeal, but as the view which we take of the construction of the will disposes of the whole case, we do not propose to deal with any of the other questions.

The testator had a sum of £10,000 due to him from Lord *Sherborne* in respect of the purchase-money of a part of the *Bibury* estate. That estate was liable to a charge of £10,000, which, however, as between the owners of the different parts of the estate, was not chargeable on the part purchased by Lord *Sherborne*, but on the residue of the estate. In this state of things the testator makes his will, by which he gives to his trustees "the sum of £10,000, due and owing from Lord *Sherborne* to me on his purchase of *Stone's Farm*, in the parish of *Bibury* aforesaid, upon trust to pay and apply the same sum in satisfaction and discharge of the contingent claim of *Thomas Fry*, clerk, upon my estate and

(1) 4 Sim. 390.

lands at *Bibury* aforesaid, in case the same should be established and become an actual charge thereon." That is, in our judgment, a simple legacy of £10,000, part of what at the time of the testator's death was clearly his general personal estate, and applicable as such to the payment of his debts; and the mere fact that it was connected with a charge on an estate of which he was tenant for life, does not appear to me to make any difference in the result. It was a specific legacy of £10,000 for the purpose of discharging a debt on the *Bibury* estate, which estate the testator had by deed settled on certain members of his family.

Having given that £10,000 for this purpose, and having directed that the £3000 to which he had become entitled as a tenant for life who had paid off an incumbrance to that amount, and the £5000 which he had power to charge, should not be raised or paid, but should sink into the freehold of the *Bibury* estate for the benefit of the persons entitled under the settlement, he makes this somewhat singular provision:—[His Lordship read the clause for the exoneration of the *Devon* estate.] Now, the gift in favour of the *Devon* estate is a gift expressed to be in case a certain condition is fulfilled, namely, in case the sum of £10,000, which the testator has given in exoneration of the *Bibury* estate, and for the benefit of the owners of that estate, should be so applied. The question is, was it so applied? Now, the sum which was in the hands of Lord *Sherborne* was paid to Mr. *Fry* in discharge of his demand, but that sum, being part of the personal estate of the testator, was applicable to the payment of his debts, which his other personal estate, as it turned out, was insufficient to pay, so that the application of the money by the executors of *Estcourt Cresswell* in satisfaction of Mr. *Fry's* charge was a wrongful payment, which could not alter the rights of the parties; and accordingly, the £10,000 so paid was afterwards recalled for the purpose of paying the testator's debts. It, therefore, is quite clear that the whole £10,000 was not applied in exoneration of the *Bibury* estate. It is urged, however, by the Appellants, that if an account is taken it will appear that the whole of the £10,000 is not required for the payment of *Estcourt Cresswell's* debts—that the *Bibury* estate will, to a certain extent, get the benefit of it, and therefore that the gift of the £13,000 is to be apportioned. We are of opinion

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that the condition of the application of the £10,000 in exoneration of the *Bibury* estate is an entire condition, and cannot be apportioned, and that unless the whole £10,000 was in truth and in substance applied properly, so as to exonerate the *Bibury* estate, the event on which the testator directed the exoneration of the *Devon* estate to take place never happened. This appears to us to be in substance the decision of the Vice-Chancellor, and I am of opinion that His Honour's decree ought to be affirmed, and the appeal dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. At the time when the testator made his will, the £10,000 claimed by the *Frys*, if it was a valid charge, which was then a disputed and doubtful matter, was chargeable primarily on the *Bibury* estate. The £10,000 due from Lord *Sherborne* was a debt due from him to the testator, and remained in Lord *Sherborne's* hands only for the purpose of an indemnity to him until Mr. *Fry's* charge was satisfied out of the settled *Bibury* estate, or determined not to be an effectual charge. In that state of things, the testator gives the £10,000 due from Lord *Sherborne* to his executors, in trust to apply it in payment of the charge due to the *Frys* if the charge became payable. Now, stopping there, we have a gift of £10,000 to the owners of the *Bibury* estate. Then the testator goes on to say, that in case the £10,000 shall be so applied in exoneration of the settled *Bibury* estate, "then the £13,000 charged upon the *Devon* estate shall cease to be chargeable on that estate, and shall be charged on the *Bibury* estate." Has the event happened? Has the £10,000 been applied in exoneration of the settled estate at *Bibury?* Surely the condition means that the owners of *Bibury* shall receive the whole benefit which the testator had given them by the previous gift. I have no doubt that the condition is entire, and that if £5000, part of the £10,000, were applied in payment of the charge due to the *Frys*, and the other £5000 went to the creditors of the testator, that would not satisfy the condition, and the disposition in favour of the *Devon* estate would not come into operation. It is true that, in a suit in Chancery brought by the *Frys* against Lord *Sherborne* and the persons interested in the *Bibury* estate,

for the purpose of having the question decided whether the charge was valid or not, the £10,000 was paid into Court and invested in consols, and that the Court decided that the *Frys* were entitled to the charge, and they received those consols in satisfaction of that charge. But at that time the testator's debts had not been paid, and that payment of the £10,000 could not exonerate the owners of the *Bibury* estate from liability to refund the £10,000 if it turned out to be wanted for payment of the testator's debts, for it was a payment out of the personal estate. That personal estate which was applicable to the payment of the testator's debts having been applied in payment of this charge, to which purpose it was applicable only by virtue of a direction in the will, the creditors, when the other personal estate proved insufficient for payment of debts, were of course entitled to have that sum raised out of *Bibury;* and upon a bill filed for that purpose it was raised out of *Bibury,* and at any rate a considerable portion of it has been applied towards payment of the testator's debts. The consequence is that, in my opinion, this condition of the will—"in case the said sum of £10,000 shall be so applied in exoneration of my said settled estate at *Bibury* aforesaid"—has not been complied with. This is not at all a technical reading of the will; it is really looking at the substance; for it is quite plain, to my mind, that the testator did not intend that any part of the £13,000 charged on the *Devon* estate should be charged on the *Bibury* estate, unless the owners of the *Bibury* estate got the full benefit of having the £10,000 due to the *Frys,* which was charged on the *Bibury* estate, satisfied by means of the £10,000 due from Lord *Sherborne.* That did not take place; and I am, therefore, of opinion that the disposition in favour of the *Devon* estate never came into operation.

Solicitors: Messrs. *Capron, Dalton, & Hitchins;* Messrs. *Bloxam, Ellison, & Bloxam.*

L. JJ.
1871
Jan. 20.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.

HARRISON'S CASE.

Company—Transfer of Shares—Bargain by Directors—Conditional Assent to Transfer—Guarantee for Payment of Calls.

7 Ch 296.

H., a shareholder in a company, being desirous of getting rid of his shares, transferred them out and out for a nominal consideration to his clerk. The directors, who had power to refuse to register transfers, declined to register the transfer unless *H.* guaranteed the payment of a call which they were about to make, and also (as they contended) all future calls. *H.* accordingly gave the guarantee, and the transfer was passed and the transferee registered as a shareholder. *H.* paid the call when made, and the company was afterwards wound up:—

Held, that the bargain with the directors was good, and the transfer valid; and that, even on the assumption that *H.* had guaranteed all future calls, he was not liable to be placed on the list as a contributory.

Decision of *Stuart*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Stuart* made in the winding up of the *Bank of Hindustan, China, and Japan, Limited*, substituting the name of Mr. *Charles Harrison* for the name of Mr. *C. J. Johnson* on the list of contributories in respect of 640 shares.

The 22nd clause of the articles of association was as follows: "The company may decline to register any transfer of shares while the shareholder making the same is, either alone or jointly with any other person, indebted to the company on any account whatsoever, or unless the transferee is approved by the board."

In the month of September, 1866, Mr. *C. Harrison* was the holder of 640 shares of £100 each, on which £25 per share had been paid up. Being the owner of considerable leasehold property in *Middlesex*, he was afraid that if at any time a winding-up order was obtained against the company it might be registered as a *lis pendens*, and affect his estate. He accordingly made up his mind to part with his shares, but delayed doing so for a time in consequence of the representations of Mr. *W. Harrison*, his brother, who was a director and large shareholder in the bank. Ultimately, however, in September, 1866, Mr. *C. Harrison* transferred his shares to Mr. *C. J. Johnson*, who was a clerk in his employment, for a

nominal consideration. The account given by Mr. *C. Harrison*, in his affidavit, of the transaction was as follows :—

"When I informed the said *C. J. Johnson* that I had determined no longer to retain my shares in the *Hindustan Bank*, but rather to lose the whole of the money which I had paid for the same, and that I should wish the brokers instructed on the subject, the said *C. J. Johnson*, being fully aware of all the reports of the company, and having all the information that I had as to the affairs and position of the bank, asked me to make the shares over to him instead of selling them on the market, and at his request I assented to transfer them to him and leave him to make anything he could by them. I had been in the habit of making the said *C. J. Johnson* presents, in addition to his salary, in recognition of his services. At the time, and throughout the said month of September, 1866, a great fluctuation in the price of the shares had taken place, and if any large number of shares had been forced on the market it was probable that very small prices, if anything, would be obtained for the same ; and that I, if I sold, would, according to the then established practice of the *Stock Exchange*, have been called upon to pay a premium, or sum of money, for a guarantee on the part of the transferee to register the same, and without such a guarantee I would not have sold my said shares, and therefore I yielded to the said *C. J. Johnson's* proposal and request, and consented to transfer the same to him without any or only a nominal consideration, and to give him the same as his own absolute property."

He also stated that he was informed by his brother that the directors were contemplating another call, and that they would probably refuse to register the transfer until that call was paid, and that he accordingly gave his brother authority to give the directors his guarantee in such way as he might think best for the payment by *C. J. Johnson* of the pending call.

The transfer was left for registration on the 4th of October, and was passed by the directors, after some discussion, on the 8th of of October. Mr. *C. Harrison* stated that the transfer to *Johnson* was absolute and unreserved, and that *Johnson* was not either expressly or impliedly a trustee for him ; and that, with the exception of the payment of the then pending call, he never, either as between himself and the company, or any director thereof, or as

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between himself and *Johnson*, agreed to become liable to pay any further sum in respect of the shares, or in any manner to indemnify or secure *Johnson* against any further claims or calls which might be made on the shares.

This statement was corroborated by Mr. *W. Harrison*, who stated that he read to the board a letter from his brother, in which he gave his reasons for wishing to part with his shares, and stated that he intended to give them to his confidential man of business, and leave him to make what use he could of them, but no mention was made in the letter of any guarantee for payment of the pending or any other call.

Three of the directors, however, filed an affidavit stating that the guarantee given by Mr. *C. Harrison*, through his brother, extended to all future calls. They said as follows:—

"At the date of the lodging of the transfer the affairs of the bank were in that condition that it was the conviction of the directors that, unless there was considerable improvement, calls would be inevitable, although they then considered that it might not be necessary to wind up the bank. The directors, therefore, at first objected to pass the transfer, believing that the calls could be well met by Mr. *C. Harrison*, while his clerk, Mr. *C. J. Johnson*, might be wholly unable to do so. The question of the transfer was again, on more than one occasion, brought before the board by Mr. *W. Harrison*, the brother of the said *C. Harrison*, who urged his co-directors to pass the transfer, and alleged that the reason his brother was desirous of having his name removed from the register of the bank was not that he desired to evade the liability upon the shares, but that, being a large owner of house property in and around *London*, the fact of his large liability in the bank becoming known might prejudice his dealings with that property. And the said *W. Harrison* stated, and, as he believed, with the authority of the said *C. Harrison*, that if the transfers were passed his brother, the said *C. Harrison*, would hold himself responsible for all calls in respect of such shares to the same extent as if the shares still remained in his name; and the said *W. Harrison* also stated that his said brother would, if required, give an undertaking in writing to such effect. And we say that it was upon this undertaking that we consented to the

transfer of the shares from the said *C. Harrison* to the name of the said *C. J. Johnson* being passed, and that we verily believe that the said *C. J. Johnson* has no real interest whatever in the said shares, but was, and is, only the nominee and trustee of the said *C. Harrison* in accepting the said transfer, and holding the said shares." It appeared from the evidence that the shares were at the time selling in the market at prices varying from £1 to £3.

Shortly afterwards a call of £3 on each share was declared, which was duly paid by Mr. *C. Harrison* on the 640 shares in accordance with his guarantee.

In November, 1866, the shareholders passed resolutions for a voluntary winding-up, which was ordered to be continued under supervision on the 21st of December following.

Mr. *Johnson* was placed on the list of contributories, but as he did not pay the calls made on him the liquidator applied to the Vice-Chancellor to rectify the register and the list of contributories by inserting the name of Mr. *C. Harrison* in the place of Mr. *Johnson*. The Vice-Chancellor granted the application (1); from this decision Mr. *Harrison* appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the Appellant:—

The ground upon which the Vice-Chancellor granted the appli-

(1) 1870. Dec. 7.

SIR JOHN STUART, V.C., after discussing the evidence, continued:—

The evidence of the three directors is so perfectly clear, and so consistent with what would appear to have been their duty, and so consistent with what was expressed in the letter which was read to the meeting, that I can come to no other conclusion than that the transfer was sanctioned upon the understanding that Mr. *Charles Harrison* would be liable to future calls.

It is needless to observe this, that both parties are agreed that this was a transfer upon terms, that there was a special agreement, and for the validity of every agreement it is necessary that both parties should distinctly understand the same thing. It is perfectly clear here what the directors understood, and if there was a misunderstanding at all, there could be no sanction of the transfer, and the transfer could not be a valid transfer. But the evidence of these gentlemen satisfies me that they have stated the truth, and therefore there must be an order that Mr. *Charles Harrison* do pay the call which has been made. I think that that is the only order you want.

After some discussion, the order was made, at the instance of the counsel for the liquidator, not for payment of the calls, but to substitute Mr. *C. Harrison's* name for Mr. *C. J. Johnson's*.

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cation was, not that the transfer was not an out-and-out transfer, but that the consent of the directors was given upon the condition that *Harrison* should guarantee the payment of the calls. We say that the condition was performed, for that the guarantee only applied to the then pending call. But even if the liquidator is right in his view of the guarantee, that is no reason for removing *Johnson's* name. *Johnson* was, and must remain, a shareholder, and is primarily liable to the calls. The liquidator must take some other proceeding against *Harrison* to enforce his rights, if he has any, under the guarantee. The directors might have refused their consent if they had pleased; but as they did not do so the transfer was complete, and could not at the time, nor can it now, be impeached.

Mr. *Greene*, Q.C., and Mr. *Higgins*, for the liquidator:—

The agreement with the directors was, that *Harrison* should be liable for all the calls, not as surety merely, but primarily. This was a bargain which the directors had no power to make. Directors cannot put a man on the register on condition that he shall not be liable for the calls, but that the calls shall be paid by some one else: *Ex parte Kintrea* (1); *Richmond and Painter's Case* (2); *Stewart's Case* (3); *Ex parte Hatton* (4); *Anderson's Case* (5). Therefore the transfer was invalid, and might have been set aside immediately after it had been made. And even if the transfer was good at the time, it ought to be now set aside, for *Harrison* has not performed his part of the contract.

Mr. *Waller*, for *Johnson*, took no part in the argument.

SIR W. M. JAMES, L.J.:—

In this case the only point before us is that which is involved in this summons, and the summons is confined to simply asking that *Harrison's* name should be substituted for *Johnson's*. I do not mean to express any opinion whatever as to whether *Harrison* may or may not be liable in any manner to pay any sum of money

(1) Law Rep. 5 Ch. 95.
(2) 4 K. & J. 305.
(3) Law Rep. 1 Ch. 511.
(4) 31 L. J. (Ch.) 340.
(5) Law Rep. 8 Eq. 509.

or to contribute in any manner to the assets of the company upon any other ground, or in any other character. The simple question to be determined upon the summons was and is, whether the name of *Johnson* was placed upon the register under such circumstances that *Johnson* himself, or the company, or any shareholder in the company, had a right the day after it was so placed there to have it removed upon the ground that it was placed there improperly and erroneously through mistake or fraud of any kind.

Now it is not contended that there is in this case any evidence whatever to induce the Court to doubt the plain positive statements on oath of both *Johnson* and *Harrison*, that the transfer that was made by *Harrison* to *Johnson* was an out and out transfer intended to be at the risk of *Johnson*, and for the benefit of *Johnson*, if benefit there should be. I say this, of course, subject to what took place at the meeting of the directors. So we have a transfer without anything whatever that would impeach that transfer according to those cases, which have been numerous in this Court, of contrivances and tricks of persons, who have put one man on when another was intended to be the real owner, for the simple purpose of enabling the real owner to escape his liability.

Supposing, therefore, nothing had been said to the directors, if the directors had not made any objection, if the transfer had been simply taken to the company's office, and there accepted and registered, there does not appear to me to be anything in the case on the ground of which the transfer could afterwards have been got rid of, on the principles of *Ex parte Kintrea* (1), or any other of the cases to which we have been referred.

Then does it make any difference that *Harrison* tells the directors his motive for parting with the shares? He had a right to sell the shares on the *Stock Exchange*. He had been pressed by one of the directors, his brother, not to part for a time with such a large number of shares; which, as any one can conceive, would in all probability have been very prejudicial to a company which was on the point of making a very large call. He makes a communication to his brother, who communicates it to the directors, that he does not like to be under the liability for this large number of shares; being apprehensive, as it appears, that if a

(1) Law Rep. 5 Ch. 95.

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winding-up order were made it would be equivalent to a *lis pendens*, and that it might prejudice him in his dealings with his leasehold property. Therefore he says: "I will not sell them all upon the market at once, but as I wish to get rid of them I will give them to my clerk." They object to this, and say: "We have power to refuse to register the transfer, and we shall do so unless you bind yourself to secure us the calls, as we are not quite satisfied of the solvency of your clerk."

The great contest in the Court below was, whether *Harrison* undertook to pay all future calls or the first call only; but in this Court the argument has been principally upon the power of the directors to make such a bargain with *Harrison*.

The case put is this: The directors refuse to consent to the transfer unless he makes this bargain with them. The bargain is made, and the transfer is accordingly passed. I am at a loss to see, if that was done *bonâ fide* by the directors, how it is possible to say that it was *ultrà vires*, or that, being *intrà vires*, it was in any way a breach of duty or a breach of trust on the part of the directors which can affect Mr. *Harrison* as an accomplice in that breach of trust. They were acting on behalf of the company dealing with *Harrison*, not for the purpose of benefiting him, but of imposing terms upon him. It seems to me to be a reasonable transaction. Possibly one might doubt the expediency of it as a matter of management; but as a matter of power which might honestly be exercised in that way so as not to fix a person dealing with them as an accomplice in a breach of trust, I cannot entertain a doubt. It was the result of a *bonâ fide* bargain by which a *bonâ fide* transferee—not a mere name, but a man who intended to be the owner of the shares—was put upon the register.

I cannot, therefore, see any ground whatever upon which on the next day *Johnson* could have been removed from the register and *Harrison* replaced; and if it could not have been done on the next day, what is there that entitles the company to do it now? They say: "You have broken your bargain. It is very true you did, in pursuance of the bargain, pay one call"—and I think that after such part performance it would be very difficult for the company to question the agreement afterwards—"but you have refused to comply with the other part of it—that is, to pay the subsequent

call, which *Johnson* is unable to pay." But you cannot revoke a conveyance or destroy a transfer of property which has been made upon a bargain because the bargain is afterwards broken. The bargain which is broken must be the subject of a distinct and independent remedy, and you cannot treat the conveyance as if it had never been executed. I am of opinion that the Vice-Chancellor was quite right in his view of the transaction, that the bargain was, that *Johnson's* name should be put upon the register, and that *Harrison* should remain liable as well as *Johnson*. The Vice-Chancellor at first proposed, upon that view of the case, to make a substantive order upon *Harrison* to pay, because the real shareholder was unable to pay. Mr. *Greene*, it appears to me, was well advised in declining to take that order. I do not think any such order could have been made on this summons. But it does not follow that, because the Court could not have made such an order upon this summons, the present order is correct. *Harrison's* liability, whatever it was, was a liability under a totally distinct contract, which contract may be enforced, if it can be enforced at all—with which we have nothing to do now—in some other manner than that which would be involved in treating the transfer as void, and substituting *Harrison's* name for *Johnson's* name on the list of shareholders.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The sole question on this summons is, whether the transfer from *Harrison* to *Johnson* was or not a valid transfer. Now, if the transfer from *Harrison* to *Johnson* had not been a *bonâ fide* transfer of the shares—that is to say, if *Johnson* had been intended to be a mere trustee of the shares for *Harrison*, and *Harrison* was to remain the owner—it might have been a question whether, under some of the authorities, the transfer being made for the purpose of avoiding liability, *Harrison* might not have been placed upon the list. On that I give no opinion at all; but it appears to me clear upon the evidence that this was a *bonâ fide* transfer in this sense: that it was intended, as between *Harrison* and *Johnson*, that *Harrison* should cease to be the owner, and that *Johnson* should become the owner of the shares. It is said, indeed, that it was a mere gift. Well, in this sense it was a

L. JJ. 1871 HARRISON'S CASE.

mere gift, that no price was paid either by *Harrison* to *Johnson*, or by *Johnson* to *Harrison*; but then the real fact is that, looking at the large number of shares, and the nominal price at which the shares were quoted in the market, a bargain under which neither party should pay anything on the transfer might be a very fair bargain; and the mere fact that there was only a nominal consideration in the transfer does not prove either that it was a gift, or that it was one from which you are to infer that the transferee was a trustee for the transferor. That being so, *Harrison* and *Johnson*—both highly respectable men, upon whose honour and truth nobody has cast any suspicion—say this was a *bonâ fide* transfer, and it was intended that *Johnson* should become the owner. I can quite understand that *Harrison*, having this objection to the company being wound up whilst he was a shareholder, on account of his *Middlesex* property, might be willing at once to transfer them at *nil*; and, at the same time, that *Johnson* might think that there was a fair chance that these shares would come to be worth something, and that therefore he should be willing to take them at *nil*.

If this had been all, and if there had been no power in the directors to refuse consent, or if simply on application they had given their consent, then it would have been a perfectly ordinary transfer, and no reason could have been suggested why it should be set aside. But the directors do make an objection. They are about to make a call, and being told of all the circumstances, and knowing that *Johnson* is only *Harrison's* clerk, they object to the transfer, and then a negotiation takes place. The directors are intrusted with this power of dissenting from a transfer; but they must do it on reasonable grounds, because the shares are intended to be transferable, and they ought to act equally between the shareholders who wish to transfer and the general body of the shareholders. I cannot see what objection there is to their saying: "We have some doubt about this man to whom you wish to transfer. If you wish to effect the transfer immediately, you must give us some security either respecting the call which we are now about to make," or, possibly, "respecting all calls." Whether he pledged himself to the further calls or not is in dispute. In my opinion, the only real objection any one can make to the conduct of these

directors is this: that if they had acted as prudent men of business they would have put the contract into writing, and would have got it signed before the transfer was made. If they had done that, I cannot conceive that any one could have made any objection to the transaction. They did not do it, and they were guilty of an act of carelessness; but I cannot believe it to be the law that if a person is *bonâ fide* bargaining with the directors of a company, and the directors of the company neglect to put the seal of the company to a contract which ought to have a seal, or to put into writing a contract which, under the *Statute of Frauds*, should be in writing, or make some mistake of that kind, they are on that account to be charged as having been guilty of a breach of trust, and the person who is bargaining with them to be held liable as a party to that breach of trust, and the whole transaction to be set aside. It appears to me that it would be a very dangerous doctrine, and one which would disturb the ordinary transactions of mankind with companies of this sort.

Equally with the Lord Justice I wish to be understood as giving no opinion at all whether *Harrison* is liable for the future calls beyond the first; or, if he is so liable, how that liability is to be enforced. At present the only question is, whether *Johnson's* name ought to be struck out, and *Harrison's* name substituted. I am clearly of opinion that it was a valid transfer from *Harrison* to *Johnson;* that *Johnson* therefore remains the existing owner of these 640 shares, and the only proper person to remain upon the list as the contributory in Class A. in respect of them.

Solicitor for the Appellant: Mr. *H. R. Beal.*
Solicitors for the Company: Messrs. *Ashurst, Morris, & Co.*

L. JJ. 1871 Jan. 23.

In re CHURCH ESTATE CHARITY, WANDSWORTH.

Charity—Land given for Support of a Parish Church—Erection of new Church—Division of Parish—Apportionment of Income between old and new Parishes—8 & 9 Vict. c. 70, s. 22.

An estate had been held from time immemorial by the churchwardens of a parish for the repairs of the church, and the rent of one field was originally applied to the repairs of the church clock. In 1820 a new church was built, and the income of the charity was carried to the general account of the churchwardens, and applied in aid of the church-rates for both churches. In 1846 the parish was divided under an Order in Council, and a new parish carved out of it, and assigned to the new church. Thenceforward each parish had its own church-rate, and the income of the charity was applied exclusively in aid of the rates for the old parish church. On a Petition by two of the inhabitants of the new parish for an apportionment of the charity between the two parishes under 8 & 9 Vict. c. 70, s. 22 :—

Held (affirming the decision of the Master of the Rolls), that the charity, being for the support of the fabric of a particular church, could not be apportioned.

THIS was an appeal from an order of the Master of the Rolls, dismissing a Petition presented by two persons resident in the new parish of *St. Anne's, Wandsworth*, praying for the apportionment, under 8 & 9 Vict. c. 70, s. 22, of certain charity property known as "The *Church* estate," between the old parish of *All Saints, Wandsworth*, and the parish of *St. Anne's*.

It appeared, although the precise terms of the gift could not be traced, that the property in question had from time immemorial been held by the churchwardens of the old parish of *All Saints, Wandsworth*, for the use and repairs of *All Saints Church*, which was till the year 1820 the only church in the parish. One field, called the "*Clock Acre*," was supposed to have been originally appropriated to the repairs of the church clock, though of late years the rent had been otherwise applied.

In the year 1820 *St. Anne's Church* was built, and was used as a chapel of ease to the parish church of *All Saints*.

In 1846, by an Order in Council, made under 58 Geo. 3, c. 45, s. 16, the parish of *Wandsworth* was divided for ecclesiastical purposes into the two parishes of *All Saints* and *St. Anne's*. From

1820 to 1846 the maintenance of the fabrics of the two churches was kept up by one church-rate levied over the whole parish, and the rents of "The *Church* estate" were carried to the general account of the churchwardens of *All Saints*, and by them applied in reduction of the church-rate. After the division, in 1846, each of the two parishes made its own church-rate, and the churchwardens of *All Saints* applied the rents of "The *Church* estate" towards the maintenance of that church only.

Since 1846 two other district churches had been built in *Wandsworth*, namely, *St. John's*, to which a part of *St. Anne's* parish, with part of a contiguous parish, had been assigned, and another church, to which part of *All Saints* parish had been assigned.

The Petition stated that the parish of *St. Anne's* had no charity estates of its own, and was now entirely dependent on voluntary support for the repairs of the church.

It prayed an inquiry whether it would be fit and proper that an apportionment should be made between the two parishes of the said endowment, or the income thereof, under 8 & 9 Vict. c. 70, s. 22 (1); and, if it should be so found, for consequential directions.

The Master of the Rolls having dismissed the Petition, the Petitioners appealed (2).

(1) By sect. 22 of 8 & 9 Vict. c. 70, it is provided, that where a separate parish is formed out of any parish as therein mentioned, it shall be lawful for the Court of Chancery, on the petition of any two persons resident in such parish, to apportion between the remaining part of such parish and the distinct and separate parish or district parish, any charitable devises or gifts which shall have been made or given to or for the use of any such parish, or the produce thereof; and it shall also be lawful for the said Court of Chancery to apportion between the remaining part of such parish, and such separate divisions or districts, any debts or charges which may have been before the period of such apportionment contracted or charged upon the credit of any church-rates in such parish.

(2) 1870. July 26.

LORD ROMILLY, M.R., after stating the facts, continued:—

It is a fair inference to be drawn from the facts, that this property was devoted to the church of *Wandsworth* at a time when the parish of *Wandsworth* had one church, and one only, and that it had always been so applied. It is a very material circumstance that a part of the estate is called the "*Clock Acre*," and is supposed to have been originally applied to the repair of the clock, although it has been diverted to another purpose since. Is it within the limits of proper and legal jurisdiction to divert a charity given for the mere support of a clock, and nothing else, in a particular place, to other purposes, or to allow other purposes to participate in it, unless there is more

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Mr. *C. W. Upton* (Mr. *Joshua Williams*, Q.C., with him), for the Appellants:—

We contend that this was a charitable gift for the use of the whole original parish, within the meaning of 8 & 9 Vict. c. 70, s. 22. There is nothing to shew what were the terms of the original gift; the only evidence is the user, and that shews that the income has been applied in reduction of the church-rates, which is in effect a benefit to the whole parish. The gift would be supported as a good charitable gift because it was for the use of the parish.

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than is required for that purpose?—when the doctrine of *cy-près* might arise, which, however, is not the case here. My opinion is, that a charity given in that way is specifically appropriated to that purpose, and is properly applicable to the purpose for which it is given, namely, the repair of the clock.

I am unable to see any distinction between that special purpose and a charity for the repairs of the fabric of the church. Supposing a donor were to say, "I give £100 for the purpose of keeping in repair the fabric of *All Saints Church*, in the parish of *Wandsworth*, for the benefit of the inhabitants, and in reduction of the church-rates," would it be a fair thing to say, that because an Act of Parliament is passed afterwards, which divides the parish of *Wandsworth* into two, this gift should be claimed and given in support of another church, when it has been devoted to the support of the fabric of that particular church?

The question depends upon the original foundation, but the burden of proof lies on the Petitioners to shew that it ought to be applied in a different manner. The constant application of the property for the purposes of *All Saints Church* would seem to lead one to the conclusion that it was given specifically for the support of that particular church, which is confirmed by the observation I have made about the "*Clock Acre*;" and I am unable to draw any distinction between the one and the other.

The property has continued to be applied for the purposes of this church, except that for twenty-six years—from 1820 to 1846—part of the income was applied to the repair of *St. Anne's Church*. But the question did not then arise, because the church-rate levied over the whole parish was applied to the support of the one church just as much as the other. If *St. Anne's Church* is now entitled, what is there to prevent the other two churches from claiming a right to participate also? and so, *toties quoties*, as often as, from the increase of the population, and the necessity of providing church accommodation in every populous district, it becomes advisable to create new ecclesiastical districts from time to time.

My opinion is, that this property was devoted to the purposes of *All Saints Church* alone, and that it is the reasonable presumption that it was specifically given for that purpose. Accordingly, I am of opinion that no case is made out for taking away part of the income from the parish and dividing it with another. I have considered this case carefully, and looked a good deal into it. I think the burden of proof is on the Petitioners, and they have failed. Accordingly, I shall dismiss the Petition, but, as no costs are asked for, without costs.

[The LORD JUSTICE MELLISH:—Would it not equally be supported if it were given to a dissenting chapel for the benefit of those who worship there?]

Only those who go to the church would get the benefit of the repairs directly, but all the parishioners would receive a benefit in the reduction of the church-rates. There are only two reported cases on the Act: *In re West Ham Charities* (1), and *Ex parte Incumbent of Brompton* (2), which were both cases of gifts for the use of the poor. The former case only decided that the exercise by the Court of the power of apportionment is discretionary. The case of *Attorney-General* v. *Love* (3), which the Respondents will rely upon, is distinguishable, for it was not a case under the Act.

[The LORD JUSTICE JAMES:—At Common Law, parishioners are not bound to rebuild a church which has fallen down; but might they not rebuild the church by means of this charitable fund?]

Mr. *Lindley* (Mr. *Jessel*, Q.C., with him), for the churchwardens of *All Saints*:—

This charity does not come within the terms of sect. 22 of the Act, and if it does the Court has a discretion as to exercising the power of apportionment, and it is not a fit case for its exercise. The fund might be applied to purposes not within the scope of a church-rate, such as the decoration of the church, or the placing in it a stained-glass window. It would have been a breach of trust to repair *St. Anne's Church* by means of this fund. From the judgment of Vice-Chancellor *Parker*, in *Ex parte Incumbent of Brompton* (4), it is clear that he was of opinion that a charity for a specific object, such as the repair of a particular church, would not be apportionable. The case is governed by *Attorney-General* v. *Love*, a decision indeed of the same Judge from whom the present appeal is brought, but which has been acquiesced in.

Mr. *Upton*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls gives the correct interpretation to this statute. The question was very

(1) 2 De G. & Sm. 218.
(2) 5 Ibid. 626.
(3) 23 Beav. 499.
(4) 5 De G. & Sm. 635.

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properly put, in the argument for the Appellant, in this way: was the charity a charity substantially for the benefit of the parishioners *qua* parishioners or not? It may have been a charity which enured incidentally for the benefit of the ratepayers, but that was only an incidental benefit, which might result in various ways from various charities within the parish. The charity was a charity for the repair of this particular church, and it appears to me that it must be considered in exactly the same way as if that church had not been a parochial church, as if it had been a church situate in some extra-parochial district, as if it had been a church *in partibus infidelium*, established as a missionary church for the purpose of converting heathens or infidels to the Christian religion; that is to say, as if the charity had been for the advancement of religion through the repairs and other use of that particular church. That being so, it appears to me that it would have been a breach of trust to have applied the funds of the charity in any other manner whatever in ease of the parishioners; for if they could have been applied in ease of the parishioners *qua* parishioners, then they might have been applied in relief of the poor-rates, or anything else to which the parishioners were liable.

The question is, is this a thing confined to that particular church? It appears to me that it is confined to that particular church, for I do not know what other limit you are to put upon it. If a dozen chapels-of-ease were built, each of them might have had as much right to a share of this as *St. Anne's* had at the time when *St. Anne's* was built; and if *St. Anne's* had not that right at the time it was built, I see nothing which gave it that right, because of the subsequent division of districts, or because of the alteration in the law of church-rates afterwards. At the time when *St. Anne's* was built it was not repaired out of the church-rates at all, and at that time it was no more entitled to this fund than any other ecclesiastical building in the parish. I am of opinion that this is not a gift for the use of the parish within the meaning of the Act of Parliament. The Master of the Rolls decided in this case as he had decided in the suit of *Attorney-General* v. *Love* (1), upon an information filed, which raised the very question which seems to be involved in this, as fully as it is raised here; because

(1) 23 Beav. 499.

if the contention on the part of the parishioners is right, then it involves this consequence—that the right claimed was a common right, independently of the provisions of the particular statute which gives us a power to apportion. The Master of the Rolls decided the question upon an information, and the result seems to have been acquiesced in by the Attorney-General, and the Master of the Rolls followed that decision in the present case. It appears to me that he was right both in that decision and in the present case. That decision is of great weight and importance, having regard to the fact that the Attorney-General, who is the guardian, so to speak, of these charities, has acquiesced in it, and therefore it may be said to have passed into law. But, independently of that, upon the construction alone of the Act, I am of opinion that this Court has no jurisdiction to make any apportionment of this fund.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The simple question is, whether, according to the true construction of the 22nd section of 8 & 9 Vict. c. 70, this particular charity is "a charitable devise, bequest, or gift which shall have been made or given to or for the use of any such parish?" Now, I am clearly of opinion that this section does not enable the Court to divert any charity from the purpose to which by the foundation of the charity it was to be devoted to some other purpose. The object of the section is simply this: that if the whole parish was entitled to the charity, if the part divided was as much entitled to it as the original part, then for convenience the Court should be enabled under this section to apportion the charity.

Therefore, the real question is whether, wholly independently of this section, this was a charity for the repair of this particular church, or was a charity for the repair of all churches that might happen to be built in the parish of *Wandsworth*, or at any rate all churches that might happen to be built and be repaired out of the church-rates of the parish of *Wandsworth*? I am very clearly of opinion that this was a charity for the repair of the particular church and nothing else, and that we should be diverting the charitable funds from their proper object to another and improper object if we were to make the order asked by this Petition. I

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think a charity of this kind, as Mr. *Lindley* has shewn, may be applied to objects to which a church-rate could not be applied at all, and I think it is only incidentally that it happens, from the repair of churches being provided for out of church-rates, that the parishioners get some benefit. It appears to me that the real object of the charity is to promote religious purposes by having this particular church kept in good repair.

Solicitors for the Appellants: Messrs. *Vallance & Vallance.*
Solicitor for the Respondent: Mr. *Michael.*

L. JJ. 1871 Jan. 24.

ORRELL *v.* ORRELL.

Election—Scotch Heir—Will—Devise of "All my Real Estate situate in any part of the United Kingdom or elsewhere."

A testator devised "all the residue of my real estate situate in any part of the *United Kingdom* or elsewhere." The testator had real estate in *Scotland* as well as *England*:—

Held (reversing the decision of the Vice-Chancellor of the Duchy of *Lancaster*), that the heir-at-law taking the Scotch lands by descent was put to his election.

THIS was an appeal by the Plaintiff rom a decision of the Court of Chancery for the Duchy of *Lancaster.*

John Orrell, by will dated the 15th of March, 1867, devised his residuary real and personal estate in the following words:—

"And as to all the rest, residue, and remainder of my real estate situate in any part of the *United Kingdom* or elsewhere, and the residue of my personal estate of what nature or kind whatsoever, I devise and bequeath the same according to the nature thereof respectively unto and to the use of the said *John Orrell* the younger, *Joseph Orrell,* and *John Ellams,* their heirs, executors, and assigns, upon trust to sell my said real estate and so much of my said personal estate as shall be of a saleable nature." The trusts of the proceeds were for the benefit of the testator's two sons, the above-named *John Orrell* and *Joseph Orrell,* and the testator's daughter and her children. The testator empowered his trustees, before sale, to exchange any part of his residuary real estate for

any other tenements or hereditaments situate in *England, Wales,* or *Scotland,* and he also gave them an interim power of purchasing estates in *England* or *Wales,* not mentioning *Scotland.*

The testator died on the 31st of July, 1867, seised of considerable real estate in *England* and of some real estate in *Scotland.* His will was inoperative to pass the Scotch estate, which accordingly descended on *John Orrell* the son, as heir-at-law.

The bill was filed by *Joseph Orrell* for the execution of the trusts of the will, and prayed for a declaration that *John Orrell,* the eldest son, was put to his election between the Scotch estate and the benefits given to him by the will. The Vice-Chancellor of the Duchy Court decided that there was no case of election.

Sir *Roundell Palmer,* Q.C., and Mr. *Jackson,* for the Appellants:—

It is needless to go through the cases establishing the general rule, for they are collected, and their result correctly given in *Jarman* on Wills (1). Mere general words, however extensive, are not sufficient, but no case lays down that when the gift is not a gift in mere general words, the ordinary rules of construction are not to be applied to ascertain what the testator intended: *Campbell* v. *Monro* (2). Here the words "in any part of the *United Kingdom*" point with sufficient distinctness to lands in *Scotland,* and the power of exchange shews that the testator had Scotch estates in his mind. *Thellusson* v. *Woodford* (3) and *Churchman* v. *Ireland* (4) are in our favour.

Mr. *Cotton,* Q.C., and Mr. *North,* for *John Orrell,* in support of the decree:—

This case is governed by two familiar rules: First, that general words will not be held to apply to a Scotch estate without clear evidence of intention, as a man is supposed only to be dealing with what he can dispose of by the instrument; and secondly, in construing a will, we are not on slight grounds to depart from the *primâ facie* meaning of the words. It is not enough to say that the words are wide enough to include lands in *Scotland;* you must shew that he had *Scotland* in his mind. He mentions it elsewhere. Why not

(1) 3rd Ed. p. 421.
(2) Court Sess. Cases (Dunlop, Bell, and Murray), vol. 15, p. 310.
(3) 13 Ves. 209.
(4) 4 Sim. 520.

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in this clause? How can the words he has used be distinguished from such an expression as "all my real estate whatsoever and wheresoever?"

[The LORD JUSTICE MELLISH:—Is not the principle this, that there must be a specific description applicable to *Scotland?*]

Allen v. *Anderson* (1) and *Maxwell* v. *Maxwell* (2) shew how the principles are to be applied. The power of exchange does not shew that he intended his will to operate in *Scotland.*

[The LORD JUSTICE JAMES:—It must lead every one to believe that he did. The only question is, whether it enables us judicially to say that he did?

The LORD JUSTICE MELLISH:—Suppose a man having no real estate, except in *Scotland,* devises "all my real estate"?]

The case, we believe, has not occurred, but we submit it would not raise election.

[They also referred to *Johnson* v. *Telford* (3) and *Hazlewood* v. *Pope* (4).]

Mr. *Bardswell,* and Mr. *O. Leigh Clare,* for other parties.

SIR W. M. JAMES, L.J.:—

In this case a testator, who was seised of certain landed property in *Scotland* as well as considerable real estate in *England,* making a will in *England* with such legal assistance as he was able to obtain in *England,* made a devise as follows: "And as to all the rest, residue, and remainder of my real estate situate in any part of the *United Kingdom* or elsewhere, and the residue of my personal estate of what nature or kind soever, I devise and bequeath the same," &c.

The question is, whether by these words the testator has expressed an intention to devise the Scotch property of which he was seised.

It is beyond all question that, by the law of *Scotland,* as it stood at the time when this will was made, a mere testamentary instrument was not sufficient to effect a posthumous disposition of pro-

(1) 5 Hare, 163.
(2) 2 D. M. & G. 705.
(3) 1 Russ. & My. 244.
(4) 3 P. Wms. 322.

perty, but that it was requisite to have some other instrument *inter vivos* from which the testamentary instrument might derive its effect. Now it has been settled in more than one case that, in construing the will of a testator entitled to Scotch property, the rule (to use the language of Lord Justice *Knight Bruce* in *Maxwell* v. *Maxwell* (1)) is, "that, according to the principles or rules of construction which the English law applies, if not to all instruments, at least to testamentary instruments liable to interpretation as the will in question is, according to its principles and rules, the generality, the mere universality, of a gift of property, is not sufficient to demonstrate or create a ground of inference that the giver meant it to extend to property incapable, though his own, of being given by the particular act." Whether that rule of law would be laid down if the matter had now to be considered for the first time, may perhaps (with all respect to the high authorities by whom it has been laid down) be open to some doubt. It does seem somewhat singular to require from a testator who is making his will in a country with legal assistance in that country, that he should be supposed to know the laws of all countries in which he may by chance be possessed of property; and when he is expressing in his will his intention to dispose of everything he has of every kind whatsoever, to attribute to him a latent intention not to dispose of property which the law of some particular country or place in which that property is situate does not allow to be disposed of by such an instrument.

From the rule so laid down, this exception has been established: that if the testator has specifically included in his testamentary dispositions property not capable of being so given, he must be held to have intended to dispose of it. The question, therefore, as it seems to me, resolves itself simply into the construction of the few words which I have read—does this will specifically mention property in *Scotland?* I am of opinion that "in any part" means in any of the three parts into which the *United Kingdom* is divided, and that the true meaning of the words "situate in any part of the *United Kingdom* or elsewhere" is, "situate in *England, Ireland, Scotland,* or elsewhere," and that the effect of the clause is exactly the same as if it had been so expressed. Had the clause

(1) 2 D. M. & G. 713.

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been thus expressed, it is scarcely contended that the testator's intention to dispose of property in *Scotland* would not have been sufficiently demonstrated. Mr. *North* contended that we must introduce the words "my real estate deviseable or disposable by this particular instrument." To introduce these words into a will, which in substance specifically purports to dispose of Scotch estates, would make the reference to *Scotland* simply idle, and would be inconsistent with authority and principle. Relying, therefore, upon those words alone, with all respect for the opinion of the learned Vice-Chancellor from whom this appeal comes, I am of opinion that here there is a plain demonstration of the intention of the testator to pass property in *Scotland*.

The other parts of the will are certainly much more consistent with this view of the testator's intention than with the contrary view. It is not to my mind necessary to call them in aid; but if there had been nothing else in the will to support the Appellant's case, I am disposed to think I might have found in the clause of sale and exchange enough to induce me to say that the testator's intention to dispose of lands in *Scotland* was expressed with sufficient distinctness.

SIR G. MELLISH, L.J.:—

I am of the same opinion. In construing this will, as in construing all other wills, we are entitled to take into consideration the state of the testator's property at the time he made his will. He had large estates in *England*, he had estates in *Scotland*, and he had no estate either in *Wales* or in *Ireland*, and being in that situation, he uses these words: "As to all the rest, residue, and remainder of my real estate in any part of the *United Kingdom* or elsewhere." Then he proceeds to devise it.

Now these are not the common and ordinary general words which you would find in any will or that anybody would be likely to use as a common form, and to my mind it is clear that these words, "situate in any part of the *United Kingdom*," whoever framed them, were introduced under the circumstances under which this will was made, for the express purpose of including the estates in *Scotland*; and that being so, I cannot find that there is any rule which prevents us from interpreting them as I feel

quite confident the testator himself intended that they should be interpreted.

MINUTES:—Declare, that the Defendant *John Orrell*, the heir-at-law of *John Orrell*, deceased, the testator in the cause, is put to his election as between the devises and bequests to him contained in the will of the testator, and the said testator's real estate situate in that part of the *United Kingdom* called *Scotland*.

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Chester & Urquhart.*

STANFORD *v.* ROBERTS.

Title-deeds—Tenant for Life—Pending Suit—Custody of Title-deeds.

A testator devised his real estate in strict settlement, giving to trustees a power of sale and exchange, to be exercised with the consent of the person entitled in possession, if of full age; and he bequeathed his residuary personalty to the trustees upon the trusts declared concerning the moneys to arise from sales under the power. Shortly after the death of the testator a decree was made at the suit of the first tenant for life, then an infant, for the execution of the trusts of the will. Parts of the estate were sold under the power and the money paid into Court, and a large fund was there applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, and as to the propriety of applying to Parliament for a private estate Act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the Court, that the trustees might be ordered to deliver to her the title-deeds of the estates, subject to the limitations of the will, which application was refused by *Stuart*, V.C.:—

Held, that, as a suit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit; and that the Court of Appeal would not interfere with the discretion of the Vice-Chancellor on the subject.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Stuart*, who had refused to order delivery to the Appellants of the title-deeds of the real estate of the testator in the cause.

The testator, *W. Stanford*, by will dated the 10th of December, 1852, appointed *Roberts, Tanner*, and *E. Stanford*, executors and trustees, and gave to his wife a yearly rent-charge of £1000 for he r

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life. He then devised all his real estate to *Smith* and *Williams* for the term of 1000 years upon the trusts thereinafter mentioned, and subject thereto to the use of his sons and their children in strict settlement, with remainder to the use of his daughter, the Plaintiff, for life, without impeachment of waste, with remainder to her first and other sons successively in tail male, with divers remainders over. The trusts of the term of 1000 years were declared to be to secure the rent-charge of £1000, to provide for the repairs of his mansion-house during his wife's occupation of it, and to provide portions for the testator's younger children. The testator gave to *Roberts*, *Tanner*, and *Stanford*, and the survivors, &c., power to receive the rents during the minority of any unmarried person entitled in possession, with the usual directions as to allowing maintenance out of them, accumulating the surplus, and investing it in real estate. Powers of leasing were given to tenants for life in possession when of full age, and to the trustees during minorities. Powers of sale and exchange and partition were given to the trustees, to be exercised with the consent of the person for the time being entitled in possession if of full age, the usual directions being given for the investment of the proceeds of sale in real estates, to be settled to like uses. The testator's wife was to be entitled to reside rent free in his mansion-house until some child of his became entitled to the occupation of it. The testator bequeathed the clear residue of his personal estate to the trustees upon the trusts declared concerning moneys to arise from the power of sale.

The testator died in April, 1853, leaving no issue but the Plaintiff, who was an infant, and shortly after the testator's death this suit was instituted in her name by a next friend; and on the 1st of July, 1854, a decree was made for carrying the trusts of the will into execution; and it was, among other things, ordered that *E. Stanford* should receive the rents and profits of the testator's real estate and pay the balances into the bank to the credit of the cause. Various sales took place of parts of the testator's real estate under the power of sale with the sanction of the Court, and the proceeds were paid into Court; and by an order made on further consideration on the 14th of July, 1855, so much of the funds in Court as had arisen from capital was carried to "the capital account," and so much as had arisen from income was carried to

"the accumulated income account," directions being given as to the maintenance of the Plaintiff.

Roberts having died, *Gordon* was appointed trustee in his room.

In 1867, the Plaintiff, then a minor, intermarried with Mr. *Benett*, and with the sanction of the Court in the cause, and under the Act 18 & 19 Vict. c. 43, for enabling infants to make settlements, a settlement was executed by which her life estate in the testator's real estate was vested in trustees.

Upon coming of age, the Plaintiff changed her next friend and carried on the suit.

After this, in July, 1870, an inquiry was directed on the Petition of the Plaintiff, whether the purchase of certain farms was a proper purchase wherein to invest £9250, to be raised out of £27,378 consols then standing to the capital account. Another order was made directing part of the funds standing to the capital account to be carried over to an indemnity account, to secure purchasers against a rent-charge. By a third order, an inquiry was directed as to the propriety of applying to Parliament for a private estate Act. The first and third of these orders were still being prosecuted.

On the 28th of November, 1870, the Plaintiff and the trustees of her settlement, who had been let into possession of the estates, took out a summons to obtain delivery to them by *Stanford* and *Gordon* (*Tanner* having lately died), of the title-deeds of the estates subject to the limitations of the will, which deeds had ever since the testator's death been in the custody of the trustees of the will. This summons having been adjourned into Court, was dismissed by Vice-Chancellor *Stuart*. The Plaintiff and the trustees of her settlement appealed.

Mr. *Waller*, for the Appellants:—

The legal tenant for life is entitled to the custody of the title-deeds: *Allwood* v. *Heywood* (1); *Garner* v. *Hannyngton* (2); *Sugden's* Vend. & Pur. (3); *Davis* v. *Earl of Dysart* (4). In *Straker* v. *Hamilton* (before Vice-Chancellor *Stuart* on the 19th of November, 1869), His Honour made such an order as we ask for in almost precisely similar circumstances.

(1) 11 W. R. 291. 9 Jur. N.S. 760
(2) 22 Beav. 627.
(3) 11th Ed. p. 468.
(4) 20 Beav. 405. 1 Jur. N.S. 743.

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[The LORD JUSTICE JAMES :—Must the deeds be delivered to a tenant for life where there are trustees with active duties to perform ?]

A trustee, no doubt, may be entitled to them where he has active duties to perform, though he has not such an estate as would *per se* entitle him to them, as *e. g.*, a termor: *Garner* v. *Hannyngton* (1); but here the trustees of the will have no estate in the land, and the mere fact of a power being vested in them, a power which cannot be exercised without our consent, cannot give them any right to the deeds.

The LORD JUSTICE JAMES asked what was the objection to giving up the deeds.

Mr. *Cecil Russell*, for the Respondents, replied that the trustees of the settlement resided in different places, and that to place the deeds in their possession would be inconvenient.

SIR W. M. JAMES, L.J. :—

This case does not appear to me to turn on the mere question of legal title. There is a pending suit which relates to these estates, and which is being actively prosecuted. The only question then is, where, having regard to the purposes of this suit, the deeds can be most conveniently kept. The Vice-Chancellor has, in the exercise of his judicial discretion, held that it is most convenient to allow them to remain where they are, and with that discretion we shall not interfere.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *W. A. Day;* Messrs. *Senior, Attree, & Johnson.*

(1) 22 Beav. 627.

CROOK *v.* HILL.

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Feb. 14, 16.

Illegitimate Children — Class — Will — Construction — Necessary Implication — A Gift to Children may by force of the Context include both legitimate and illegitimate Children.

A testator gave a legacy to "my son-in-law, *J. C.*," and gave leaseholds to trustees upon trust "during such part of my term and interest therein as my daughter *Mary*, the wife of the said *J. C.*, shall happen to live," to pay the rents to her for her separate use, "independently of her present or any after-taken husband;" and after her death directed them to stand possessed of the leaseholds for such of her children as she should by will appoint; and in default of appointment, for her children who should attain twenty-one, or, being a daughter or daughters, marry under that age. The testator's daughter *Mary* had, with the testator's assent, gone through the ceremony of marriage with *J. C.*, who had been her deceased sister's husband. There were two children of this marriage, born before the date of the will, who were recognised by the testator as his grandchildren, and at the time of the making the will the testator's daughter was *enceinte* of another child, who was born after the testator's death:—

Held (reversing the decision of *Stuart*, V.C.), that the two eldest children were entitled to take under the gift to children, no opinion being given as to whether the child who was in *ventre sa mère* at the date of the will, and at the testator's death, could also take.

THIS was an appeal by the Plaintiffs from an order of Vice-Chancellor *Stuart* allowing a demurrer to the whole of their bill, the statements of which were to the following effect:—

John Hill, by will dated the 9th of March, 1859, after giving "to my son-in-law, *John Crook*," all sums of money which might be owing from him to the testator, and after giving certain leasehold houses to trustees upon trust for his wife for life, directed the trustees, after his wife's death, to stand possessed of three of them upon trust "during such part of my term and interest therein as my daughter *Mary*, the wife of the said *John Crook*, shall happen to live," to pay the rent to her for her separate use, "independently of her present or any after-taken husband," subject to the proviso for cesser thereinafter contained; and after her decease he directed that the same premises "shall go, remain, and be upon such trusts for the benefit of all and every or such one or more, exclusively of the other or others, of the children or child of my said daughter *Mary Crook*, upon such conditions, with such restric-

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tions, and generally in such manner, as she, my daughter *Mary Crook*, shall by her last will, &c., appoint;" and in default of appointment, "upon trust for the child, if only one, or all the children, if more than one, of my said daughter *Mary Crook* who, being a son or sons, shall either before or after the decease of my said daughter *Mary Crook*, attain the age of twenty-one years, or, being a daughter or daughters, shall either before or after the decease of my said daughter *Mary Crook* attain that age or be married under that age, to take, if more than one, in equal shares," with the usual hotchpot clauses. The testator then declared, that in case his daughter *Mary Crook* should alienate or incumber her estate, or if the same life estate should by operation of law or otherwise become vested in any person or persons other than herself, then her life estate should determine, and the estates subject thereto should devolve on the person or persons next entitled thereto in order of succession under his will, as if his daughter *Mary Crook* were then dead, but without prejudice to her power of appointment. There was a gift over in the event of there being no child of *Mary Crook* who, being a son, should attain the age of twenty-one years, or, being a daughter, attain that age or marry.

The testator died on the 22nd of March, 1859. The marriage between *John Crook* and *Mary Crook*, which had taken place with the testator's sanction in 1854, was, to the knowledge of the testator, void, *John Crook* having been the husband of *Mary Crook's* deceased sister. They had two children born in the testator's lifetime, who were recognised by the testator as his grandchildren. At the date of the will she was *enceinte* of a third child, *Robert Crook*, who was born after the testator's death, and she afterwards had another child.

Mary Crook died in 1868, having by will exercised her power of appointment in favour of such of her four children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry.

The widow of the testator died in 1868, and the present bill was filed by the two eldest children of *Mary Crook* against the trustees and executors, and against *Robert Crook*, to establish their title to the above property. The executors demurred, and the demurrer was allowed by Vice-Chancellor *Stuart*.

Mr. *Dickinson*, Q.C., and Mr. *F. H. Colt*, for the Appellants:—

This case is very close upon *Holt* v. *Sindrey* (1), and the distinction on which the Vice-Chancellor relied, that in this case the testator knew all the facts, is not, we submit, sufficient. His Honour also thought that illegitimate and legitimate children cannot take as one class, but that difficulty is removed by *Owen* v. *Bryant* (2). In *Harris* v. *Lloyd* (3), on which the Vice-Chancellor much relied, there was nothing in the will to alter the *primâ facie* meaning of the word "children;" and in *Lepine* v. *Bean* (4) the context was not strong. The whole series of cases, *Wilkinson* v. *Adam* (5), *Meredith* v. *Farr* (6), *Dover* v. *Alexander* (7), *Jarman* on Wills (8), *In re Overhill's Trusts* (9), *Beachcroft* v. *Beachcroft* (10), *Dilley* v. *Matthews* (11), *Fraser* v. *Piggott* (12), *Howarth* v. *Mills* (13), *Savage* v. *Robertson* (14), *Clifton* v. *Goodbun* (15), and *Worts* v. *Cubitt* (16), are consistent with the view that a context like the present, which leaves no doubt of the testator's intention, is sufficient to include the children of *Mary Crook* by *John Crook* who were in existence in the testator's lifetime. The testator, in his will, recognises the marriage, and he could not have contemplated legitimate children of *Mary Crook* by *John Crook*, since they were incapable of marrying.

Mr. *Greene*, Q.C., and Mr. *Speed*, for the Defendants:—

If this demurrer is overruled, *Wilkinson* v. *Adam* and *Harris* v. *Lloyd* must be overruled also. The Appellants wish to import into the will the words "including her children by the said *John Crook*." Had these words occurred, we admit that the demurrer would have failed, but the testator has not said this, nor, we submit, anything to the same effect: *Cartwright* v. *Vawdry* (17); *Bayley* v. *Snelham* (18). The general rule is given in *Jarman* on Wills (19).

(1) Law Rep. 7 Eq. 170.
(2) 2 D. M. & G. 697.
(3) T. & R. 310.
(4) Law Rep. 10 Eq. 160.
(5) 1 V. & B. 422.
(6) 2 Y. & C. Ch. 525.
(7) 2 Hare, 275, 281.
(8) 2nd Ed. vol. ii. p. 197.
(9) 1 Sm. & Giff. 362.
(10) 1 Madd. 430.
(11) 13 W. R. 676.
(12) You. 354.
(13) Law Rep. 2 Eq. 389.
(14) Ibid. 7 Eq. 176.
(15) Ibid. 6 Eq. 278.
(16) 19 Beav. 421.
(17) 5 Ves. 530.
(18) 1 S. & S. 78.
(19) 3rd Ed. vol. ii. p. 209.

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[The LORD JUSTICE JAMES:—Suppose he had said "her children, whether by her present or any future husband," would the Plaintiffs have taken?]

Possibly so, though no case has gone so far as that, and such an expression as that suggested is much stronger than anything found here. There must be "necessary implication" to enable them to take: *Williams* on Executors (1).

[The LORD JUSTICE JAMES:—"Necessary" cannot be taken in its strict sense. There was no absolute necessity in *Dilley* v. *Matthews* (2), for the husband might have returned to his wife and had legitimate children.]

Lord *Eldon* defines necessary implication in *Wilkinson* v. *Adam* (3). The rule as to illegitimate children is also laid down by Lord *Lyndhurst* in *Mortimer* v. *West* (4). We rely on *Cartwright* v. *Vawdry* (5), *Harris* v. *Lloyd* (6), and *Bagley* v. *Mollard* (7). The case of *Barnett* v. *Tugwell* (8) cannot stand with *Bagley* v. *Mollard*. In all the cases cited on the other side there was something very special. In *In re Wells' Estate* (9) there were strong circumstances in favour of illegitimate children, yet they were held not to take. They cannot take under the same class gift with legitimate children: *Dover* v. *Alexander* (10); *In re Standley's Estate* (11). *Pratt* v. *Mathew* (12) lays down that rule distinctly.

[The LORD JUSTICE JAMES:—How can that stand with *Owen* v. *Bryant*? (13)]

Mason v. *Bateson* (14) supports our case.

Mr. *Dickinson*, in reply:—

The foundation of the Respondent's argument is, that legitimate and illegitimate children cannot take in the same class. There are only *dicta* in favour of such a rule; no case decides it, and some conflict with it. Lord *Cranworth*, in *Owen* v. *Bryant*, repu-

(1) 6th Ed. 1023.
(2) 13 W. R. 676.
(3) 1 V. & B. 422.
(4) 3 Russ. 370.
(5) 5 Ves. 530.
(6) T. & R. 310.
(7) 1 Russ. & My. 581.
(8) 31 Beav. 232.
(9) Law Rep. 6 Eq. 599.
(10) 2 Hare, 275.
(11) Law Rep. 5 Eq. 303.
(12) 22 Beav. 328.
(13) 2 D. M. & G. 697.
(14) 26 Beav. 404.

diates it. The rule that "children" means legitimate children is only a *primâ facie* rule, which may be modified by the context; and in many of the cases cited against us, the *ratio decidendi* was that nothing appeared on the face of the will to take the case out of the *primâ facie* rule. In *Cartwright* v. *Vawdry* (1) and *In re Wells' Estate* (2) there was nothing but conjecture in favour of the illegitimate children. *Holt* v. *Sindrey* (3) differs from this case only in two points—the testator's ignorance of the illegitimacy (which cannot make any difference) and the use of the words "begotten or to be begotten," which are unimportant, for "*procreatis*" and "*procreandis*" have no different effect (4).

SIR W. M. JAMES, L.J.:—

In this case, after the very full and able arguments which have been addressed to us, we think that we shall not derive any benefit from adjourning the delivery of our judgment. We are the more induced to decide the case at once by the consideration that, in this as in almost every case of this nature, the decision must be a decision applicable to the particular will, and to that only. The rules of law and of construction applicable to this case are—first, that a gift to children means a gift to the lawful children of a lawful marriage, unless (which is the second rule) there be something which, in express terms, or by what has been called "necessary implication," shews that the gift is to illegitimate children exclusively, or to illegitimate children to be included in a class with, or to a class of illegitimate children who are to take conjointly with, another class of legitimate children. It is agreeable to us to find so clear a rule laid down as to what is meant by "necessary implication" as that which we find in Lord *Eldon's* judgment in the case of *Wilkinson* v. *Adam* (5); that is, that necessary implication means, not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed.

The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously

17 Eq 366

(1) 5 Ves. 530.
(2) Law Rep. 6 Eq. 599.
(3) Law Rep. 7 Eq. 170.
(4) Co. Litt. 20 b.
(5) 1 V. & B. 422.

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against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed?

Now, what are the facts which surrounded the testator when he made this will? He had a daughter who had married the widower of her deceased sister. That marriage was invalid in point of law, though considered by many persons as perfectly proper and binding in the eye of heaven. That marriage was made with the knowledge of the testator, with his sanction and approbation, and from that union there had sprung children whom the testator had recognised as his grandchildren. That being so, he makes his will, in which he begins by a gift to the person treated by him as the husband of his daughter—"my son-in-law, *John Crook*;" and then he carefully describes his daughter *Mary* as "the wife of *John Crook*," and mentions "her present husband" in a way which may be supposed to amount to an intentional recognition of the relation of husband and wife, notwithstanding the defect in the union.

[His Lordship here read the limitations in favour of *Mary Crook* and her children.]

Now, considering that the testator, no doubt, intended and believed that *Mary* and *John Crook* should and would live together as husband and wife after his death; that he recognised their union as a lawful union, which it would, in his view, I presume, be a violation of God's law to break; and knew that they had children, and that there was a probability of their having other children—to attribute to him an intention to give *Mary Crook* a power of appointment in favour of such children as she might happen to have from some marriage with a person whom she might intermarry with after the decease of her then present husband, *John Crook*, seems to me to be imputing to him an intention so absurd that my judicial mind revolts from it. It seems to me that

when he is talking of her, and of her present husband, and of her children, in whose favour he disposes of the property, he must have intended to treat as children those children whom he saw, and whom he knew as the children of that union which he himself in his will refers to as a marriage, and to include them in the class of children, though not, of course, exclusively, nor so as to exclude any class of legitimate children whom his daughter might have by any subsequent marriage.

That being so, it appears to me unnecessary to refer to many of the cases to which our attention has been called. The case seems to me to be nearer to *Wilkinson* v. *Adam* (1) than to any of the other cases in the books. In that case the gift might have taken effect in favour of legitimate children in a state of circumstances highly improbable. It was a gift by a married man to his children by a woman not his wife, which might be answered by legitimate children supposing he had survived his wife and then intermarried with the particular woman referred to; but the Lord Chancellor, and the Judges who assisted him, thought that the contingency was so remote as to be entirely out of the contemplation of the testator, and that the Court was justified, therefore, in rejecting it. In the present case the notion of making a gift to the children only of a future marriage, to take place after the dissolution of the then union between his daughter and the person whom he called his son-in-law, seems to me to be an equally absurd intention to impute to the testator.

I am unable to draw any substantial distinction between this case and that of *Holt* v. *Sindrey* (2), decided by the Vice-Chancellor from whom this appeal is brought. The fact that there the words are "begotten or to be begotten" would be a very narrow foundation for any distinction. The words "begotten or to be begotten" no doubt pointed more clearly to existing children, but they are mere common words, not indicating any particular intention, for the word "children" means children begotten or to be begotten. If the words had been "whether by her present or any future husband," it would be scarcely possible to exclude the Plaintiffs from the gift; and I am judicially satisfied upon the whole will that the words here amount to as plain an indication of intention in

(1) 1 V. & B. 422. (2) Law Rep. 7 Eq. 170.

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their favour as those words would have done. I am, therefore, of opinion that this demurrer ought to be overruled.

SIR G. MELLISH, L.J. :—

I am of the same opinion. After the satisfactory argument which has taken place, and the number of cases which have been cited, I apprehend the proper way of coming to a decision is to collect as clearly as we can what is the rule of law on the subject, and then to apply that rule to the construction of the will. There is, in my opinion, very little advantage in a minute comparison of the words of one will with the words of another will, for the purpose of seeing to which of the wills upon which a construction has been put by reported cases the will before us comes nearest. The proper way is to find out what is the rule, and then apply that rule, without regarding whether the rule may have been strictly applied in other cases or not.

Now it is clearly established, at any rate by the more modern cases, that although there is a very strong presumption that the word "children" means only legitimate children, yet the word "children" may denote a class including illegitimate as well as legitimate children, provided you find in the will a context raising what is described as a "necessary implication;" that is to say, a plain and clear inference, leaving no reasonable doubt that the illegitimate children are intended to be included. If there cannot be a class of legitimate and illegitimate children taking together under the word "children," the judgment of the Vice-Chancellor must be supported, because it is impossible to say that, if *Mary Crook* had contracted a valid marriage and had legitimate children, those legitimate children would not have taken under this will. But it appears to me, as I have said, to be clearly settled by authority that the word "children" may, by force of the context, carry the property to a class including both legitimate and illegitimate children.

Now that being the rule, we have next to consider the circumstances under which the testator made his will. We find that his daughter, with his consent, had gone through the ceremony of marriage with *Crook*, who previously had been the husband of her deceased sister, and that she had children by him. Now I think we

cannot shut our eyes to the fact that, though unquestionably in point of law the children of such a marriage are illegitimate, and such a connection is in law regarded as incestuous, yet nevertheless there are many persons who look upon such a connection as constituting a lawful marriage, and who look upon such children as legitimate. Therefore it is not anything astonishing if you find a testator in his will telling you that he looks upon such a marriage as a real marriage, and looks upon the children as legitimate. And it appears to me that if the testator has, in unmistakeable language, told us that that is his intention, and that he means his will to be construed accordingly, it is the duty of the Court to construe it according to what he has shewn by the words of his will to be his intention. Supposing he had said in terms: "I do not choose to call them illegitimate children, and I do not choose to talk of them as children of my daughter *Mary* by *Crook;* and I declare that, in construing my will, the marriage of my daughter with *Crook* is to be regarded as a legal marriage, and her children by *Crook* are to be regarded as legitimate children"—it is, I apprehend, clear that the Courts must have carried out his intention. I think that he has, in substance, said so, and in words upon which there cannot be any reasonable doubt; for it is to be observed that the bequest to his daughter for her life, and the bequest to the children afterwards, come directly one after the other, and, in fact, are parts of the same clause. We find the testator, in the first place, directing the rents to be paid to *Mary Crook* "for her sole separate and exclusive use and benefit, independently of her present or any after-taken husband." How can we possibly doubt, when we find such words as those in the will, that the testator regarded the ceremony of marriage between his daughter and *Crook* as being a valid marriage? He then proceeds: "I leave the estate to the separate use of my daughter *Mary Crook*, the wife of *John Crook*, to be free and independent of the control of her present husband or any future husband, and after her death" (possibly, of course, in the lifetime of that very husband) "I leave it to such of her children as she may appoint." Is there any doubt that, in his mind, the children of that union were children who might benefit by this clause? I am aware there may be some difficulty in saying that an inference is a necessary inference from the words, when, looking

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at the case apart from legal rules, the same inference, even if there had been no such words, must have been drawn from the bare facts of the case; but I can only say that, to my mind, the language of the will does not leave the least doubt that the testator regarded the marriage of his daughter with *Crook* as a lawful marriage, and regarded their children as legitimate children. Having come to that conclusion, I consider that we are bound to say, according to the principle laid down in the authorities, that the two children who were born before the date of the will are entitled to take under the gift. We are not called upon to decide whether the third child, who was in *ventre sa mère* at the date of the will, and at the testator's death, is entitled to participate.

Solicitors for the Appellants: Messrs. *Turner & Son.*

Solicitors for the Defendants: Messrs. *Wilkins, Blyth, & Marsland.*

L. JJ. 1871 *Feb.* 13, 14.

THOMPSON *v.* HUDSON.

Appropriation of Payments—Debtor and Creditor—Composition—Remitter.

H. was indebted to *T.* on three accounts. On one demand a judgment for a definite sum had been obtained and registered. As to the others, only decrees for an account had been obtained. An agreement was entered into by which the amounts of the unascertained demands were settled, and *T.* agreed to accept, in satisfaction of all three demands, a smaller sum, to be paid by certain instalments, and to be secured in a given way, and in default of any of the instalments being paid to the day, *T.* was to be remitted to his right to recover the whole amount. *H.* paid one instalment, but failed to pay anything further. A bill having been filed by *T.* to enforce his judgment on the real estate of *H.* as against subsequent incumbrancers:—

Held, by the Master of the Rolls, that the case was governed by the ordinary rule that, where a debtor makes a payment on account without appropriating it, the creditor may appropriate it to which debt he pleases, and that *T.* was therefore entitled to appropriate the instalment to his unsecured debts; but

Held, on appeal, that it must be appropriated to the three debts rateably.

THIS was a motion by way of appeal from a decision of the Master of the Rolls as to the appropriation of a sum of £33,000 paid by *Hudson* in part discharge of sums due from him to the *York and North Midland Railway Company.*

In December, 1853, an order was made in a suit, in which the *York and North Midland Railway Company* were Plaintiffs, declaring that the Defendant *Hudson* was liable to pay to the company £54,590, and ordering him to pay £20,000, part of this sum, on the first day of Hilary Term then next, and the residue on or before the first day of Easter Term then next. This order was duly registered as a judgment. Two other suits by the same company were pending against *Hudson*, in one of which £4104 and in the other £14,831 was claimed. In each of these suits a decree for account had been made, but the sum due had not been ascertained. The *North Eastern Railway Company* afterwards succeeded to the position of the *York and North Midland Railway Company*.

Hudson, at this time, was seised in fee of the *Newby Park* estate and the *Whitby* estate. He had, in October, 1853, agreed to sell the *Newby Park* estate to Lord *Downe* for £190,000, but the purchase had not yet been completed.

On the 30th of January, 1854, an agreement was made between the railway company and *Hudson*, which began by reciting the three suits, and that a decree had been obtained for payment of the £54,590, and that in the other two only a decree for an account had been obtained, and that the company claimed £4104 and £14,831 in those suits, "which said several sums the Defendant admits the Plaintiffs are entitled to recover under the said several decrees, but his liability to which several sums the Defendant would, by appeal against the said several decrees, or some of them, have disputed if the arrangement herein contained had not been entered into;" and, by the witnessing part, *Hudson*, "in consideration of the said several sums so decreed or claimed in the said respective suits being due to the Plaintiffs, and the said Plaintiffs forbearing to require immediate payment of the said sum of 20,000, and also consenting, upon certain conditions hereinafter specified, to accept the sum of £50,000, subject to the deductions hereinafter named, in discharge of the said respective sums due to them in the said suits," and also the sum of £1000 in discharge of certain specified costs of suit, agreed that he and his trustees would, within fourteen days, execute to the company a mortgage of the *Newby Park* estate for securing those sums of £50,000 and £1000, with interest; and that on the 6th of April,

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being the day fixed for the completion of the sale to Lord *Downe*, Lord *Downe* should pay to the company, out of the purchase-money, the sum of £20,000 in part of their said claim, and the sum of £1000 in respect of costs; and that *Hudson* and all other proper and necessary parties should execute to the company, or to trustees to be named by them, a mortgage of the *Whitby* estate, for securing to the company the repayment of the sum of £30,000, less certain deductions, by way of set-off, which reduced the amount to £25,613; and then the agreement proceeded: "In consideration of the said several agreements on the part of the said Defendant, the said Plaintiffs, by their said solicitors, undertake and agree that on the said Defendant paying and securing the said sums of £20,000, £1000, and £25,613, with such interest as aforesaid, in manner aforesaid as for principal money, interest, and costs, they (the said Plaintiffs) will accept the same in full discharge of the several sums decreed or claimed to be due to them in the said suits for principal, interest, and costs; and will, at the expense of the Defendant, release their lien upon the estate purchased by the said Lord Viscount *Downe* as aforesaid, and at the expense of the Defendant execute a proper release and discharge of their claims upon the Defendant." Then followed a proviso that, if Lord *Downe* or the Defendant should not pay and secure the said sums to the company in manner aforesaid, or if a good and satisfactory mortgage should not be executed to the company for the £25,613 and interest, the company should be at liberty to recover the full amounts claimed in the suits.

The mortgage for £51,000 on the *Newby Park* estate and its purchase-money was given on the 16th of February, 1854, to *Thompson* and *Seymour*, as trustees for the railway company; but it was found that the rest of the agreement could not be carried into effect, the surplus of Lord *Downe's* purchase-money not being sufficient to enable *Hudson* to pay off incumbrances on the *Whitby* estate, and so give a first mortgage upon it. A fresh agreement was therefore come to, which appeared never to have been reduced into writing; but it was recited in a deed of release and reconveyance, dated the 21st of October, 1854, to Lord *Downe*, which was indorsed on the mortgage of the 16th of February, 1854; and in a mortgage of the same date, which was given by Mr. *Hudson*

to trustees for the *North Eastern Railway Company*, on the *Whitby* estate. The first recital was as follows: "Whereas, at the time of the date and execution of the several hereinafter recited indentures, bearing even date respectively with these presents, the whole of the within-mentioned principal sum of £51,000, composed of the two within-mentioned sums of £50,000 and £1000, remained due and owing to the said *North Eastern Railway Company*, as standing (by virtue of the hereinbefore recited Act of Parliament) in the place of and as substitute for the within-mentioned *York and North Midland Railway Company*, together with the sum of £952 12*s.* 6*d.* in respect of the interest upon the said principal sum of £51,000, calculated up to the day of the date of the said indentures of even date with these presents, as the said *George Hudson*, and likewise the said *North Eastern Railway Company*, and the said *H. S. Thompson* and *G. H. Seymour*, hereby severally admit; and whereas, notwithstanding that by the firstly hereinbefore recited indenture of even date with these presents, the whole of the sum of £181,000 (being the consideration-money therein mentioned) is expressed to have been paid by the said *William Henry* Viscount *Downe* to the said *George Hudson*, yet in point of fact the sum of £33,000, part of the said sum of £181,000, was immediately before and at the time of the date and execution of the said last-mentioned indenture paid by the said Viscount (by the direction of the said *George Hudson*, and with the privity and approbation as well of the said *R. P. Philipson* and *J. J. Wright*, as of the said *H. S. Thompson* and *G. H. Seymour*, as they hereby severally admit) to the said *North Eastern Railway Company*, £952 12*s.* 6*d.*, part thereof, being paid in full satisfaction and discharge of all moneys due and owing for interest upon the security of the within written indenture, and £31,047 7*s.* 6*d.*, the residue of the said sum of £33,000, being paid in part satisfaction and discharge of all moneys due and owing for principal, costs, and otherwise upon the same security, and all the decrees, orders, and proceedings therein respectively recited or referred to, as the said *North Eastern Railway Company* hereby admits."

The recital in the mortgage of the *Whitby* estate, dated the 21st of October, 1854, was as follows: "And whereas, shortly previous to the execution of these presents, the said *George Hudson*

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applied to and requested the said *North Eastern Railway Company* to vary the terms of the said agreement of the 30th day of January last, in order to enable him, out of the purchase-money payable by the said Viscount *Downe*, to pay and discharge the claims of the several persons (other than the said *North Eastern Railway Company*) having charges, liens, or claims upon the said estate and premises contracted to be sold to the said Lord Viscount *Downe*, and upon the said hereditaments and premises at *Whitby*, whereof a first mortgage was, by the said hereinbefore recited articles of agreement of the 30th day of January, 1854, agreed to be given to the said company, and the said *North Eastern Railway Company*, upon such application and request, thereupon consented that the terms of arrangement and compromise which had been previously agreed upon, and which are contained in the said hereinbefore recited articles of agreement of the 30th day of January, 1854, should (but, nevertheless, without prejudice to the right of the said company to recover the whole of the moneys ordered to be paid to them by the said final decree in the said secondly hereinbefore mentioned suit, and the whole of the moneys which the said company are entitled to recover in the said firstly and thirdly hereinbefore mentioned suits, and the consent to final decrees therein contained in the said hereinbefore recited agreement of the 30th day of January last, in case the principal sum and interest hereinafter secured, or any part or parts thereof, are not duly paid on the respective days hereinafter appointed for payment thereof) be varied in the following particulars:—First, that, instead of the sum of £21,000 being paid to the said company out of the before-mentioned purchase-moneys to be paid by the said Lord Viscount *Downe*, such company should receive the sum of £33,000 thereout, and that a competent part of the said sum of £33,000 should be applied in payment of all interest due in respect of the principal moneys agreed to be paid and secured by the said *George Hudson* in manner hereinbefore mentioned, and the residue of the said sum of £33,000 should be applied in payment of such principal moneys." There followed other provisions, which were carried into effect by several deeds, a statement of which will be found in the report of a previous appeal (1). It will be sufficient for

(1) Law Rep. 2 Ch. 255.

the present purpose to say that, on the execution of the above-mentioned deed of release and reconveyance of the 21st of October, 1854, *Thompson* and *Seymour*, as trustees for the company, received the £33,000 from Lord *Downe*; and that by the above-mentioned mortgage of the same date, reciting the payment of the £33,000, of which £953 had been applied in payment of the interest of the moneys secured by the deed of the 16th of February, 1854, and that the residue, £32,047, had been received by the company in part payment of the principal, leaving £14,566, the balance of the principal, the *Whitby* estate (subject as therein mentioned) was conveyed to *Thompson* and *Seymour*, subject to redemption on payment by *Hudson* of the £14,566, as to one moiety, on the 21st of October, 1855, and as to the other moiety, on the 21st of October, 1856; with an express stipulation, in very full and formal terms, that the right of the company to recover the full amount to which they were originally entitled should not be taken away, except on full payment by *Hudson* of the principal moneys and interest thereby secured "on or before, but not after, the several days hereinbefore appointed for payment thereof."

No part of the principal secured by the last-mentioned mortgage having been paid, *Thompson* and *Seymour*, in 1863, filed their bill to enforce their securities, and a decree for accounts was made. The Master of the Rolls, on an application in the course of taking the accounts, held that the proviso restoring the company to their old rights, on *Hudson's* making default in payment, was in the nature only of a penalty; and accordingly directed the accounts to be taken on the footing that the Plaintiffs were entitled only to the £14,566 and interest. This decision was affirmed on appeal by Lord *Chelmsford*, *dissentiente* the Lord Justice *Turner* (1), but was reversed by the House of Lords (2), who held that effect was to be given to the proviso according to its terms. The position of the company was therefore this: they were registered judgment creditors for £54,590 and interest, and also creditors for £18,935 not secured by judgments, and the question became material, as between them and subsequent incumbrancers on the *Whitby* estate, how the £33,000, which had been received by them from Lord *Downe*, ought to be appropriated. The Master of the

(1) Law Rep. 2 Ch. 255. (2) Law Rep. 4 H. L. 1.

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Rolls held that the case was governed by the ordinary rule that, where no appropriation is made by the debtor at the time of making a payment on account, the creditor may appropriate it to which debt he pleases (1). From this decision the subsequent incumbrancers appealed.

Mr. *Jessel*, Q.C., and Mr. *Jackson*, for the Appellants:—

We admit that we asked too much in the Court below, where we

(1) 1870. Jan. 27.

LORD ROMILLY, M.R., after stating the facts:—

The first contention now made is, that this £33,000 was properly applicable to the payment of the secured debt due under the first decree, or, if not, that at least it ought to be applied rateably in payment of the debts due under the three decrees; and that the Plaintiffs having applied it, first, in payment of the unsecured debt, have done what they were not entitled to do, and that consequently, instead of only charging the Plaintiffs with the receipt of the sum of £11,464 5*s.* 6*d.* in discharge of the secured debt, as the Chief Clerk has done by his certificate, he ought to have charged the Plaintiffs with the whole £33,000, and that consequently the balance of £21,535 14*s.* 6*d.* has been improperly omitted by the Chief Clerk. I think that the Chief Clerk was right on this question, and that the railway company, that is, the Plaintiffs, were entitled to do what they have done. I do not assent to any of the arguments relied on by the party moving. In the first place, I think that no case of appropriation of payments arises here, but that it is an arrangement by which, in consideration of the Plaintiffs' executing the conveyance to Lord *Downe*, they are to receive £33,000 out of the purchase-money, unfettered by any condition as to how they are to apply it, further than this, that it was to go in part discharge of what Mr. *Hudson* owed to the company. I am clearly of opinion that they might apply it as they pleased in discharge of any debt due from him, and that they might do so at any time up to the time when they did actually so apply it. It is true that a man who pays money to a creditor may direct how it is to be appropriated; but if he does not, the creditor may appropriate it as he pleases. But not only was no such direction given here, but in this case, though it was in this sense Mr. *Hudson's* money, that is, it was the money paid for an estate of which he was the owner nominally, having regard to the mortgages on it, it was not paid by him, and he, in fact, had no control over it. So, also, I see nothing in the state of circumstances existing here to shew that this sum ought to be applied in discharge of the £51,000 which had been, but which was no longer, a charge on the estate, because that had been conveyed free from all incumbrances to Lord *Downe*, and this was, if anything, a charge upon the purchase-money. The £51,000 to be received by the Plaintiffs was only under an agreement, which was forfeited, so far as Mr. *Hudson* was concerned, by the failure to perform his part of it, and consequently the whole amount originally due from him remained owing. In no way that I look at it can I see any obligation on the railway company to apply the money otherwise than in the manner they thought most for their advantage. I think, therefore, the first exception must be disallowed.

contended that the £33,000 ought to be appropriated to the sum payable under the first decree in the first suit; but the Master of the Rolls has gone too far the other way. When a sum is payable as an instalment of a composition, it is by the agreement itself appropriated at the time of payment rateably to all the debts. If there is to be appropriation to one debt, it should be to the debt due on the judgment, for that was the only one payable at the time of the agreement. If the Plaintiffs are remitted to their rights, so must we be to ours; so there is as much reason to say that *Hudson* was remitted to the right of saying *solvitur in modum solventis*, as that the Plaintiffs were remitted to their right to appropriate in default of appropriation by the debtor. The money out of real estate is more properly applicable to the secured debt than to the others.

[They also referred to *Young* v. *English* (1), *Pearl* v. *Deacon* (2), and *Favene* v. *Bennett* (3).]

Sir *R. Baggallay*, Q.C., and Mr. *Williamson*, for the subsequent incumbrancers:—

At the time of the agreement one sum of a certain amount was due. The amounts of the other claims were unsettled. As part of the price of the agreement they were settled, and in terms which shew that such settlement was not merely for the purposes of the agreement, but for all purposes. We, being remitted to our old rights by the failure of *Hudson* to perform his part of the agreement, could appropriate whichever of the three debts we pleased.

[The LORD JUSTICE MELLISH:—Is there any case where, neither party having a right to appropriate at the time of payment, either party has been held to have such a right afterwards?]

We cannot find any authority on the question; but we submit that, as a matter of principle, the right to appropriate was only suspended, not gone; and that we, being by the express terms of the agreement restored to our rights, are restored to that of appropriation.

SIR G. MELLISH, L.J.:—

The question which has been raised on this appeal is, how a sum of £33,000, which was paid by Mr. *Hudson* to the *North Eastern*

(1) 7 Beav. 10. (2) 24 Beav. 186. (3) 11 East, 36.

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Railway Company in October, 1854, is to be appropriated, as between three separate debts which were owing at that time by Mr. *Hudson* to the *North Eastern Railway Company*. It becomes material to determine that, for this reason: that, as to the largest of those debts, viz., one for £54,590, a decree had been obtained, and that decree had been registered so as to make that debt a charge on Mr. *Hudson's* lands; whereas, as respects the other two debts, one of £4101 and the other of £14,831, with interest, no final decree had been obtained, and those sums are not a charge on Mr. *Hudson's* lands. Therefore it now becomes the interest of the *North Eastern Railway Company* to apply as much of this £33,000 as they can in fully paying off the £14,831 and the £4104, and interest, before they apply it in payment of the £54,590; and it becomes the interest of some subsequent mortgagees of Mr. *Hudson* that the contrary application should be made, and that, if possible, the whole of the £33,000 should be applied in satisfaction of the £54,590. Accordingly they contended before the Master of the Rolls, and to some extent before us, that the whole of the £33,000 ought to be so applied. The Master of the Rolls came to the conclusion that the case was to be governed by the ordinary rule in *Clayton's Case* (1); that is to say, that no appropriation having been made by the debtor at the time when he made the payment, the creditor had his ordinary right to appropriate it to which of the three debts he pleased, and that nothing had happened to deprive him of that right. Now, it is obvious that this conclusion of the Master of the Rolls assumes that, at the time when the £33,000 was paid, there was no appropriation either by the act of Mr. *Hudson*, who paid it, or by the agreement under which it was paid; and the real and primary question to be determined is, whether, according to the true construction of that agreement, there was any appropriation by virtue of the agreement itself. For the purpose of determining that question, we must first see what are the provisions of the agreement of the 30th of January, 1854, because that was the first agreement, and the agreement under which the £33,000 was paid was merely a modification of that agreement. [His Lordship here stated the substance of the agreement of the 30th of January, 1854, to the same effect as above.] It has been said that the

(1) 1 Mer. 572.

amounts due in respect of the claims in the second and third suits were settled only for the purposes of this agreement, but it appears to me clear beyond doubt that a final settlement of the sums due in respect of those claims was come to, and that by virtue of this agreement the sums recoverable in those suits became fixed and definite sums as between the parties, and they evidently were so considered in all their future agreements. This, then, in substance, was an agreement by which, it being recited that three several sums were due from *Hudson* to the company, the company agreed to accept certain sums to be paid and secured in the manner therein specified in full satisfaction and discharge of the sums so due. It was found that Mr. *Hudson* could not complete this agreement, and it became necessary to enter into a new agreement. This new agreement, under which the £33,000 was paid, does not appear to have been reduced into writing, but it is recited in two deeds of the 21st of October, 1854, namely, a release and reconveyance to Lord *Downe*, and a mortgage on the *Whitby* estate given to the Plaintiffs as trustees for the company. [His Lordship then read the recital given above from the deed of release and reconveyance to Lord *Downe*.] That is a recital of the agreement and of the payment. Now that the £952 12*s*. 6*d*. is specifically appropriated towards payment of the interest is, of course, open to no question; the only question is, whether the £32,047 7*s*. 6*d*. is not also specifically appropriated. It is stated that this sum is paid in part satisfaction and discharge of all moneys due and owing for principal, costs, and otherwise, upon the security of the 16th of February, 1854, and the decrees, orders, and proceedings, and it is paid in part satisfaction of the £51,000 if that ultimately proves to be the sum due, and of the £74,000 if that ultimately proves to be the sum due, but it is in part satisfaction of all sums due, whatever they may be. The question is, whether that is not practically the same thing as if it had been said to be paid in satisfaction *pro ratâ* of all sums due for principal, costs, and otherwise, and whether its true effect is not that, as soon as the payment was made and received under the agreement, a *pro ratâ* part of each debt was thereby paid and satisfied.

Now, it is only fair to Sir *Richard Baggallay* that I should refer to the recital in the second deed, though it does not appear to me

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that there is any substantial difference between this and the other recital. [His Lordship read so much as is set out above of the recital in the mortgage of the *Whitby* estate]. There followed clauses, which I think I need not read at length, which, according to the construction put upon them by the House of Lords, restored the company to their full rights, in the event of *Hudson's* not making his payments on the appointed days.

Now, I think it necessary to consider what appears not to have been previously, as far as we can ascertain, determined, viz., what is the ordinary appropriation of moneys when they are paid as an instalment of a composition in respect of several debts? It is obvious that this agreement, though not made with several creditors, but only with one creditor, is really an agreement by which the creditor, in consideration of getting certain securities (a consideration which would make the agreement binding at law as well as in equity), binds himself to accept a certain composition (that is to say, a certain sum smaller than the amount which was due to him), in full satisfaction and discharge of the whole of the several large debts, provided such composition is paid by certain instalments, and those instalments are paid to the day. Now, under an agreement of that kind, when the debtor pays the first instalment, in respect of what is it paid? The composition (in this case the sum of £51,000) is to be paid quite as much in respect of one of the debts as of the other. No distinction is made between the debts which are earlier in point of time and the debts which are later in point of time, or between the debts which are secured in a certain way and the debts which are not secured in a certain way; but the composition, if paid, is to be a composition in respect of all and every of those debts, and the instalment is to be an instalment and part payment of that composition, but which, as a matter of course, if the composition never gets paid, so that the creditor is restored to his full rights, is, nevertheless, beyond all question, to be taken as a payment on account of the debts due. It appears to me that such a composition, from the nature of the transaction, is a composition equally upon all the debts, and in an ordinary composition deed it would be so expressed, because nothing could be more according to common form than to say that the creditors agree to accept 10*s.* in the pound on their respective debts, in full

satisfaction and discharge of the whole of them, of which 10*s.* in the pound, 5*s.* in the pound on all the debts is to be paid immediately on the execution of the deed, and the other 5*s.* six months afterwards. Suppose that under an agreement of that kind 5*s.* in the pound is at once paid? What is it? It is expressed to be 5*s.* in the pound on the whole amount of the respective debts, and in my opinion there can be no doubt that the moment the payment was made, 5*s.* in the pound on each and every of those debts would be discharged. It appears to me that the effect of the present agreement is the same, and that this construction is not altered by the fact that the parties, instead of calling the composition 5*s.* or 10*s.* in the pound, chose to say, as they do in this case, that in lieu and satisfaction of the debt of £74,000, the creditor will accept a payment of £51,000, and of that £51,000 £33,000 is to be paid at once out of a particular fund, which was payable by Lord *Downe*, and the remainder is to be payable by certain instalments, and if those instalments are not paid to the day, then the creditor is to be restored to his full rights. There is nothing to appropriate the £33,000 which is paid to one of the debts more than to the other debts. I cannot think that such a case comes within the ordinary rule in *Clayton's Case* (1), that if a debtor owes a creditor several debts, and makes payments and does not appropriate them to any one of the debts more than the other, then the creditor may appropriate them. That rule assumes, first of all, that the debtor has a right to appropriate at the time, and that if he does not do it, then the creditor has a right to do it. Now, could any such appropriation have been made here? Suppose Mr. *Hudson*, when he paid the £33,000, had said: "It will be more convenient to me, if this composition comes to nothing, to pay off a portion of the £54,590, and therefore it is to be taken in satisfaction and discharge of the £54,590, for which the final decree is entered, and which is a charge on the land; therefore I appropriate it to that." I think the railway company would have been entitled to say: "That is no part of our bargain; you bound yourself to pay £33,000 at once, generally, on account of all the debts, and we are not going to accept it on account of one particular debt; you must pay it on account of all the debts; if you do not, it will not be a

(1) 1 Mer. 572.

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payment in accordance with our agreement, and we shall at once proceed to enforce our whole debt of £74,000." If, on the other hand, the *North Eastern Railway Company* had said: "It will be convenient to us, if you do not pay your full composition, that this should be appropriated to the payment of the £4104 and the £14,831 first, and therefore we will now appropriate it to the £4104 and the £14,831, and leave only the balance to go to the £54,590;" Mr. *Hudson* would have been entitled to say: "That is not the agreement; the agreement is to pay it equally in payment of all, and how can it be appropriated to the £4104 and the £14,831, when, if I pay the whole sum of £51,000 to the day, by the instalments specified, a very large proportion, nearly a third of the £4104 and the £14,831, will never have to be paid at all?" That clearly shews that, at the time the payment was made, appropriation by Mr. *Hudson* on the one side, or the *North Eastern Railway Company* on the other, was not open, and if so, the payment must have been appropriated by the agreement, and that appropriation could not be altered by anything that might afterwards be done by either of the parties. In my opinion, therefore, the £33,000, after deducting the sum specified for payment of interest, which is to be paid in full up to the time of the payment of the £33,000, ought to be taken to have been appropriated by the terms of the agreement itself in paying off an equal sum in the pound on all the debts in respect of which it is paid.

SIR W. M. JAMES, L.J.:—

I entirely concur in the judgment given by the Lord Justice, and in his reasons for that judgment. The matter will go back to Chambers, with a declaration that of the £33,000 £1000 is to be applied in payment of costs, and that the remaining £32,000 is to be apportioned rateably between the three debts as they stood at the date of payment, each apportioned part to be applied, first, in payment of the interest, and then in payment of the capital of the particular debt.

Solicitors: Messrs. *Williamson, Hill, & Co.;* Messrs. *Elmslie, Forsyth, & Sedgwick*

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L. JJ.
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Feb. 28.

Will—Residuary Devise—Wills Act (1 *Vict. c.* 26), *s.* 25—*Gift of "the rest of my Lands in H."*

A testatrix gave certain lands in the parish of *H.* to *A.*, *B.*, and *C.*, as joint tenants in fee, and devised to the Plaintiff "the rest of my freehold hereditaments in the parish of *H.*, and all my freehold hereditaments in the parishes of," &c. The devise to *A.*, *B.*, and *C.*, having been declared void, as made on a secret trust for a charity:—

Held (affirming the decision of the Master of the Rolls), that the lands comprised in that devise did not pass under the gift of "the rest of my freehold hereditaments in the parish of *H.*," but were undisposed of.

THIS was an appeal by the Plaintiff from part of a decree of the Master of the Rolls.

The testatrix, *Eliza Springett*, by will, dated the 21st of February, 1866, declared her will to be, that in case she should not in her lifetime have well and effectually disposed of certain property in the parish of *Hawkhurst*, of which she gave a particular description, the property should go, and she thereby devised the same to *Jesse Piper*, *Jesse Piper* the younger, and *Edward Piper*, their heirs and assigns, as joint tenants. She then proceeded: "I devise the rest of my freehold hereditaments situate in the parish of *Hawkhurst* aforesaid, and all my freehold hereditaments situate in the parishes of *Ticehurst*, *Salehurst*, *Pevensey*, and *Westham*, all in the county of *Sussex*, to *Thomas Brook Springett*, of *Hawkhurst* aforesaid, Esq., in fee simple."

This bill was filed by Mr. *Springett* to set aside the above devise to the *Pipers*, on the ground of its having been made on a secret trust for a charity. The Master of the Rolls held that the devise was void, and that the property was undisposed of (1). The Plaintiff appealed, alleging that it passed under the gift of the rest of the testatrix's lands in *Hawkhurst*.

Mr. *Joshua Williams*, Q.C., Mr. *Southgate*, Q.C., and Mr. *G. W. Collins*, for the Appellant:—

The scope of the *Wills Act* evidently was to assimilate the law

(1) Law Rep. 10 Eq. 488.

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as regarded devises of real estate to that as to personalty: *Carter* v. *Haswell* (1). The enactment in sect. 25 precisely expresses what the law was before as to personalty: *Jarman* on Wills (2); *Oke* v. *Heath* (3); *Falkner* v. *Butler* (4). To ascertain whether a devise is a residuary devise within the meaning of the section, you must ascertain whether it has the properties of a residuary devise. Now, a reversion in fee in lands in the parish of *Hawkhurst* would have passed under this gift: *Wheeler* v. *Waldron* (5). The word "rest" is a proper introduction to a residuary gift: *Lydcott* v. *Willows* (6). After-acquired land in *Hawkhurst* would have passed under this gift: *Doe* v. *Walker* (7); *Goodlad* v. *Burnett* (8); *Culsha* v. *Cheese* (9). The restriction as to locality cannot take away from the gift the character of a residuary gift. Suppose a testator gave an estate in *England* to *A.*, and the rest of his lands in *England* to *B.*, an Irish estate to *C.*, and the rest of his lands in *Ireland* to *D.*, surely the gifts to *B.* and *D.* are both residuary. The 25th section carries out the idea of sect. 24. Take the will as speaking from the death, and the gift includes the lands expressed to be devised to the *Pipers*, for the devise to them was void. The Court will not readily hold what is previously ineffectually given to be excepted from the residue: *Bernard* v. *Minshull* (10); *Green* v. *Dunn* (11); *Cogswell* v. *Armstrong* (12); *Evans* v. *Jones* (13). Even before the *Wills Act*, these lands would have passed under this gift: *Doe* v. *Sheffield* (14); *Smith* v. *Lomas* (15); *Hawkins'* Construction of Wills (16). The 25th section contains nothing to restrict it to a general residuary devise. There may be particular residues. *De Trafford* v. *Tempest* (17) is strongly in our favour; so is *Green* v. *Dunn*. There cannot be any distinction between "rest" and "rest and residue." *Attree* v. *Attree* (18) is for us.

(1) 3 Jur. (N.S.) 788.
(2) 3rd Ed. vol. i. p. 729.
(3) 1 Ves. Sen. 135.
(4) Amb. 513.
(5) Allen, 28.
(6) 3 Mod. 229.
(7) 12 M. & W. 591.
(8) 1 K. & J. 341.
(9) 7 Hare, 236.
(10) Joh. 276.
(11) 20 Beav. 8.
(12) 2 K. & J. 227.
(13) 2 Coll. 516.
(14) 13 East, 526.
(15) 12 W. R. 949.
(16) Page 45.
(17) 21 Beav. 564.
(18) Law Rep. 11 Eq. 280.

Mr. *Jessel*, Q.C., and Mr. *Hume*, for the co-heiresses, were not called upon.

SIR W. M. JAMES, L.J.:—

We are of opinion that the decision of the Master of the Rolls ought to be affirmed.

The question is, whether the gift contained in this will of what has been called a particular residue of lands in a particular parish amounts to a residuary devise within the meaning of sect. 25 of the *Wills Act*. The words are: "I devise the rest of my freehold hereditaments situate in the parish of *Hawkhurst*," &c. There is no doubt that the word "rest" may, in certain cases, have the character of what is called a residuary devise either general or particular, but that must be upon the construction of the particular instrument. In the case last cited the testator, in substance, said: "I give a portion of my property to *A.*, and I give the rest to *B.*;" that means the rest of all he had in the world, and the gift was a general residuary devise. But it seems to me impossible to apply that construction where what is given is the residue or the "rest" of property in a particular place, of some property out of which there was a previous gift.

I asked, in the course of the argument, what would be said in such a case as this: A man says, "I give all my £3 per Cents. to *A.*, and all the rest of my Government stock to *B.*," and the gift of the £3 per Cents. to *A.* fails by lapse. Will they go to *B.*? It appears to me the answer must be in the negative, for it is quite clear that the rest of the Government stock there was not a residuary bequest which could take in the particular thing which was given by a separate description to somebody else. The other illustration I gave was this: "I give all my *London and South Western* stock to *A.*, and I give all the rest of my railway stock, or all other my railway stock (which would seem to be the same) to *B.*" The failure of the first gift would not be for the benefit of the person to whom the other stocks are given. So it appears to me that, in the present case, the gift of the rest of the lands in *Hawkhurst* has not the effect of a residuary devise. It is as if the testator had given certain lands in *Hawkhurst* to *A.*, and then given by name certain other lands there (which happened to be all the others he had) to *B.*

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It is said, and no doubt with great force, that we are to construe gifts of land under the new law with reference to and by way of assimilation to gifts of personalty. Now if there were a gift of personalty in such a way as to amount to what is called a gift of a particular residue, as in those cases which have been referred to, where there was a gift of certain furniture to the widow, and a gift of the furniture "not hereinbefore disposed of" to his son, I take it it would be impossible to doubt that still what the son takes is given to him as a specific legatee, and that he does not take as residuary legatee; therefore it appears to me that what the Plaintiff takes under the gift in the present will he takes, not as a residuary devise, but as a specific devise, and I think it impossible to bring the gift within the words of the Act of Parliament, "the residuary devise (if any) contained in such will."

The case, moreover, appears to me to be covered by authority, for I cannot distinguish it in principle from *In re Brown's Trusts* (1), where the present Lord Chancellor, when Vice-Chancellor *Wood*, uses words which are entirely applicable to this case: "Suppose she had given a part of this estate in fee to a devisee who afterwards died in her lifetime, and by a subsequent codicil she had devised all that part of the estate which was not before given, that would be as plain a specific devise as possible; and I think I should be stretching the statute prodigiously if I were to hold that the devise in question in this case is a residuary devise." I am of the same opinion in this case. We should be stretching the statute prodigiously if we were to hold that a gift of the rest of the lands in a particular parish was a residuary devise within its meaning.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

It appears to me there are two questions in this case; first, whether, from the language of the testator, you can infer an intention that if the previous devise did not take effect on account of the secret trust, or from any other reason, these lands should pass to the Appellant. I am of opinion that no such intention can be naturally inferred. First of all there is a specific devise of these

(1) 1 K. & J. 522, 528.

lands to the *Pipers*, not expressing any trust, but, as has been found, on a secret trust for charitable purposes. Then the testatrix devises to the Appellant "the rest of my freehold hereditaments situated in the parish of *Hawkhurst*." Now, as a matter of construction, it is impossible to infer from those words that she had any intention to pass to the Appellant these particular lands which she had before devised to the *Pipers*. This appears to me to distinguish the case from those which have been cited respecting what is called a particular residue of personal property, for every one of those cases appears to me to have gone upon this, that from the language of the testator it was to be inferred that he intended the particular property, if the gift of it failed, to pass under the bequest of the particular residue of that description of property.

Now in the case which I think was the one most relied upon, perhaps, by Mr. *Williams*, *De Trafford* v. *Tempest* (1), the testator gave to his widow certain chattels which at the time of his decease might happen to be at, or in, or about his capital mansion, messuage, and dwelling-house at *Trafford Park*. He subsequently bequeathed to his son, Sir *Humphrey Trafford*, all his household and other furniture, plate and chattels, not thereinbefore otherwise disposed of (except money and securities for money), which at the time of his decease might happen to be at, in, or about his said capital messuage, or dwelling-house at *Trafford Park*. Those were very strong words, from which it can be easily inferred that he did intend that if the previous devise to his widow from any cause, such as her dying in his lifetime, did not take effect, all his chattels in that house should go to his son. The words themselves, "not hereinbefore otherwise disposed of," express that if the particular chattels did not go to his widow, he meant them to go to his son. So in *Petre* v. *Petre* (2), where a testator, having a power of appointment by will over a sum of stock, bequeathed two sums of £5000 and £500 sterling thereout to *A.* and *H.*; then gave to trustees all and singular the rest, residue and remainder of the said estate, trust moneys, property, and premises so as aforesaid settled and assigned by him under and by virtue of the said before-recited indenture of assignment, after deducting from the whole of the said estate, trust moneys, property, and premises the said sum

(1) 21 Beav. 564. (2) 14 Beav. 197.

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of £5000 and the said legacy of £500, upon trust to invest the same for the benefit of his son. The decision simply was, that there not having been enough to satisfy the £5000 and the £500 in full, the gift of the residue failed. It was so held because that is the true construction of the language. The testator gave £5000 and £500 out of the trust funds, and all the rest and residue of them he gave to somebody else. Then it was justly said, if there is no rest and residue, if the £5000 and £500 cannot be paid, then the donee of the rest and residue gets nothing. The case turned upon the question what the testator meant by his words. If a testator uses language from which you can infer his intention to be that if a gift of certain property fails, that property shall pass under a gift of the residue of his property in a particular parish, I do not at all mean to say that it would not so pass. The next question is, whether the lands passed to the Appellant under the 25th section of the *Wills Act*. Now, in order that a residuary gift may, under the 25th section of the *Wills Act*, include lapsed and void devises, without the will expressing any intention to that effect, I am of opinion that the devise must be a real residuary devise; that is to say, so worded as to apply to all land that is not otherwise disposed of. When a testator has made a gift of that kind, then the Act, in substance, says it will be presumed from the universality of the gift that, unless he expresses the contrary, he intends it to pass what was specifically devised, if from any cause the specific devise fails; and I must say that the section appears to me to assume that there can be only one residuary devise in the will, for it says, "shall be included in the residuary devise (if any) contained in such will." That appears to me to shew that the Legislature intended the section to apply only where there was what may be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands.

Solicitors: Messrs. *Monckton & Monckton;* Messrs. *Dawes & Sons.*

WILKINSON *v.* DENT.

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March 11.

Election—Will—Second Election.

A testatrix devised "all and singular the estate and mines of *A.*" to trustees in trust for sale, and gave to *T. D.* £10,000, which was to be taken in full satisfaction of any sums which she might owe him at her decease, and to *W. D.* £3000, which she declared was to be taken in satisfaction of any rent-charge out of a certain part of her real estate. Her will contained the usual devise of trust and mortgage estates. She was in possession of the entirety of the *A.* estate, but was owner only of one moiety, being in possession of the other moiety by virtue of a mortgage, the money due upon which was subject to trusts, under which *T. D.* and *W. D.*, on her death, became entitled each to one-fifth:—

Held (affirming the decision of the Master of the Rolls), that *T. D.* and *W. D.* were put to their election between the benefits they took under the will and their shares in the mortgage-money.

THIS was an appeal by the Plaintiff, *Thomas Dent*, and the Defendant, *William Dent*, from so much of an order of the Master of the Rolls as put them to their election.

The testatrix, by will dated the 24th of August, 1847, gave and devised "all and singular the estate and mines of *Aroa*, in *Columbia*, formerly the estate of *Simon Bolivar*, the Liberator, with all and every the rights, royalties, members, and appurtenances thereunto belonging, and all benefit and advantage thereof in every respect," to trustees in fee, upon trust for sale; and she gave to her brother *Thomas Dent* a legacy of £10,000, which she directed to be taken to be in full satisfaction of any sum or sums of money in which she then was, or at the time of her decease might be, indebted to him. She devised to the same trustees, their heirs and assigns, all such real estates as were vested in her as trustee or mortgagee in fee, or otherwise, upon the trusts and subject to the equities affecting the same. By a codicil dated the 24th of August, 1847, the testatrix gave to her brother *William Dent* a legacy of £3000, and declared that it should be taken in lieu and satisfaction of any rent-charge out of a certain part of her real estate.

At the time of making her will, and of her death, the testatrix was in possession of the entirety of the *Aroa* estate, but was owner only of one moiety. She was in possession of the other moiety as

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mortgagee under a mortgage for an amount exceeding the value of the property comprised in it. The mortgage-money was impressed with the trusts declared by a deed dated the 7th of May, 1833, under which *Thomas Dent* and *William Dent* were entitled each to one-fifth of the money after the death of the testatrix.

The estate at *Aroa* had been sold under the direction of the Court; and one moiety of the proceeds having proved insufficient to pay the mortgage debt, the Master of the Rolls made an order declaring that *Thomas Dent* was entitled to one-fifth part of a moiety of the purchase-money, and that *William Dent* was entitled to another one-fifth part of the same moiety, and that *Thomas Dent* and *William Dent* were respectively bound to elect between any sums taken by them respectively as bounty under the will or codicil, and their respective shares in the moiety of the purchase-moneys under the indenture of the 7th of May, 1833.

Sir *Roundell Palmer*, Q.C., Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the Appellants:—

The testatrix only intended to dispose of her beneficial interest, for she has made a separate devise of trust and mortgage estates: *Rancliffe* v. *Parkyns* (1). The case of *Padbury* v. *Clark* (2) is therefore distinguishable. A particular case of election is raised on the face of the will, and a second case cannot be raised by inference: *East* v. *Cook* (3); *Dillon* v. *Parker* (4); *Story*, Eq. Jur. (5); *Cooper* v. *Cooper* (6).

Mr. *Jessel*, Q.C., and Mr. *Freeman*, and Mr. *Southgate*, Q.C., and Mr. *W. W. Karslake*, appeared for the Respondents, but were not called upon.

SIR W. M. JAMES, L.J.:—

The first question is, whether, according to the reasonable construction of this will, the entirety of the *Aroa* property passed by the devise: "I give and devise all and singular the estate and mines of *Aroa*, in *Columbia*, formerly the estate of *Simon Bolivar*, the Liberator, with all and every the rights, royalties, members,

(1) 6 Dow. 149, 185.
(2) 2 Mac. & G. 298.
(3) 2 Ves. Sen. 30.
(4) 1 Sw. 359, 403.
(5) 10th Ed. vol. ii. p. 333.
(6) Law Rep. 6 Ch. 15.

and appurtenances thereunto belonging, and all benefit and advantage thereof in every respect, to my said trustees hereinafter named, their heirs and assigns."

At the time of making her will the lady was in possession of the entirety of the property, one-half as beneficial owner and one-half as mortgagee in possession, subject to redemption upon payment of a sum which, beyond all question, never would be paid. This mortgage-money was subject to the trusts of a deed which had been executed by her testator, and kept by himself amongst his own papers. It appears to me utterly impossible to suppose that when she said: "I give and devise all and singular the estate and mines of *Aroa*, in *Columbia*, formerly the estate of *Simon Bolivar*, the Liberator," she meant only to give such estate and interest as she had in the property. A will must be construed reasonably even where, by so doing, parties are put to their election.

Then, as to the second point, it is said that there is no testamentary bounty as to which the parties are put to their election. There are two legacies, one to one person, and one to another, which legacies, the will declares, are to be taken in satisfaction of certain demands against the estate. It is the common case where the father of a family leaves a legacy to a member of his family, and says: "You must take that, and not raise any question against my estate." It is argued that in such a case there is a special direction which prevents election as to other parts of the will, and reference was made to the case of *East* v. *Cook* (1). It is not very easy to understand that case, but probably it was of this kind: My eldest son is owner of a bit of property. It would be convenient that this bit of property should go along with a property which I am devising to my second son; so I make a devise of this bit of property to the second son; and, among other gifts to my eldest son, I give him a piece of property which I state in my will to be in lieu of his bit of property which I purport to take away from him. In such a case the eldest son is merely put to his choice between those two bits of property. It is a case where the ordinary doctrine of election is excluded by an apparent expression of intention by the testator that only one of the gifts to the eldest son is conditional on his giving up what the testator purports to

(1) 2 Ves. Sen. 30.

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take away from him. Such a case in no way governs the present. It was suggested that here there is no testamentary bounty to the brothers, inasmuch as the legacies to them are given in satisfaction of their claims against the testatrix. This cannot be maintained, for it is impossible to say that, if the demand had been satisfied and the rent-charge extinguished in the lifetime of the testatrix, these legacies would have failed. The question is, whether there is testamentary bounty to a person whose estate and right are, under another part of the will, interfered with. It appears to me clear that this question must be answered in the affirmative, though before the amount of the bounty can be ascertained the amount of the claims which the legatees had against the testatrix must be ascertained, and I think that the Master of the Rolls was quite right in saying that these legatees were put to their election.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Freshfield;* Mr. *H. Ward;* Messrs. *Finch & Jennings.*

L. JJ. 1871 *March* 15.

WHITING *v.* BURKE.

Co-sureties—Sureties by separate Instruments.

A bond was executed by a principal and two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the Plaintiff signed a separate undertaking to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the Plaintiff and obtained payment of the amount due. The Plaintiff filed his bill against the solvent surety in the first bond for contribution:—

Held (affirming the decision of *Malins*, V.C.), that the Plaintiff was entitled to contribution from the Defendant.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1). The facts were as follows:—On the 28th of September, 1866,

(1) Law Rep. 10 Eq. 539.

Arthur Crux as principal, and *Theodore Crux* and *W. H. Burke* as sureties, executed a bond to the *Protector Endowment, Loan, and Annuity Company*, in the sum of £800, to secure the repayment of certain sums of money in the bond mentioned, by quarterly instalments of £33 5*s.* each, the last of such payments becoming due in September, 1870. And the obligors covenanted with the company that, if any of the quarterly payments should be in arrear, or in any of the events indorsed upon the bond—one of which was, if either of the obligors should be declared a bankrupt or make a composition with his creditors—in such case not only any quarterly sum which might then have become due, but all sums of like amount which would have become due if the principal debtor had outlived the 28th day of September, 1870, and such day had actually arrived, should immediately become payable, and payment thereof might be enforced by the company. And the sureties to the said bond covenanted with the company that they, or either of them, should not be released or discharged from the bond by any arrangement which might, either with or without the assent, and notwithstanding the dissent, of the sureties, be made between the principal and the company, either for continuation or alteration of time of payment, or for additional security, or by any dealing or transaction which should take place between the principal and the company.

In the month of August, 1868, *Theodore Crux* executed a deed of composition with his creditors, whereby he covenanted to pay them 2*s.* in the pound in discharge of their debts.

Upon the failure of *Theodore Crux*, and in consequence of one of the instalments being in arrear, the company commenced proceedings against *Arthur Crux*, and before they would consent to stop proceedings against him they required him to produce another surety in the place of *Theodore Crux;* and *Arthur Crux* thereupon applied to the Plaintiff, who was then about twenty-one years of age, to assist him. Accordingly, on the 24th of August, 1868, the Plaintiff, without taking any other advice, went with *Arthur Crux* to the office of the *Protector Company*, and signed an undertaking of that date. By this document, which recited the bond of the 28th of September, 1866, and the commencement of proceedings at law against *Arthur Crux*, and that the Plaintiff had requested the company not to further prosecute the proceedings against

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Arthur Crux, but to permit the sum of £299 5s., which was then due, to be paid by nine instalments, according to the tenor of the said bond, in manner therein appearing, to which request the company had acceded upon having the additional security of the Plaintiff's undertaking and guarantee for the amount by instalments thereafter provided, the Plaintiff undertook to pay the company the sum of £299 5s. by quarterly instalments of £33 5s. each, and in case of default in payment of any instalment, the full amount then remaining unpaid to become due and payable.

This arrangement was carried into effect without any communication with *Burke*.

On the 5th of December, 1868, *Arthur Crux* became bankrupt.

In January, 1869, the *Protector Company* commenced proceedings at law against the Plaintiff for payment of the amount due upon the bond, in which they recovered judgment; and they obtained a charging order on the Plaintiff's share in certain funds standing to his credit in the Court, and subsequently received, by order of the Court, the sum of £383 10s. in satisfaction of all claims under the bond.

The Plaintiff then filed the present bill against the Defendant *Burke*, praying that he might be ordered to pay to the Plaintiff a moiety of the sum so recovered, with interest; and that *J. H. Clarke*, another Defendant, who was the assignee of *Arthur Crux*, might be ordered to pay to the Plaintiff the other moiety, and also to pay to the Defendant *Burke* the moiety of the principal and interest directed to be paid by him to the Plaintiff.

The Defendant *Burke* stated, in his answer, that the Plaintiff had agreed with *Arthur Crux* to enter into partnership with him in some shooting-grounds, and that one of the conditions was, that the Plaintiff should take upon himself all the claims of the *Protector Company*, and relieve *Arthur Crux* from all liability; and submitted that, by that arrangement, the Defendant was released. It appeared, however, that the matter of the partnership never proceeded beyond mere negotiation; and *Arthur Crux* stated in his affidavit that, to the best of his belief, it was clearly understood by all parties that the Plaintiff was to be co-surety with *Burke*.

The Vice-Chancellor granted the relief prayed against *Burke*, but made no decree against *Clarke*.

From this decree *Burke* appealed.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, for the Appellant, contended that there was no intention to create a co-suretyship. There was an agreement between the Plaintiff and *Arthur Crux*, that the Plaintiff should undertake the liability for the whole debt, and there was no communication with *Burke*. The Plaintiff having entered into a separate undertaking to pay the whole amount due, had no right to claim against the Defendant a contribution to a debt which he voluntarily took upon himself. A man has no right to pay off another's debt, and then sue him for what he has paid.

Mr. *Cotton*, Q.C., and Mr. *Harvey*, for the Plaintiff, were not called on.

SIR W. M. JAMES, L.J.:—

This appeal entirely fails. The original bond contained a very stringent provision, that no arrangement whatever between the principal debtor and creditor, as to giving time to the debtor or one of the sureties, should release the other surety—a provision perhaps not unreasonable, because the giving of time usually operates in favour of the sureties. Then the Plaintiff signed an instrument, professing in terms to be made by way of additional security, for payment of the bond "according to the tenor thereof" —that is, the Plaintiff says: "You have now only one surety; if you will consent not to proceed with your action, I will give my name as surety in addition." He thus became a surety for the same debt for which *Burke* was a surety; and in that case, in whatever way he became surety, if the other surety is called on to pay, he must contribute.

But it is said that there was a special agreement that the Plaintiff should pay the debt entirely himself, without looking to *Burke* as being liable at all. But when we look at the evidence, there is really no conflict as to the result of it. There was a talk about a partnership between the Plaintiff and *Arthur Crux*, which never proceeded beyond a negotiation, but went off. If it had gone on, it would have resulted in the Plaintiff paying off all the debt

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himself. But it went off, and the matter remained according to its legal effect, namely, that each surety was liable to contribute to the debt. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiff: Messrs. *Algernon Wells & Sykes.*

Solicitors for the Defendant *Burke:* Messrs. *James, Curtis, & James.*

L. JJ. 1871 March 21, 22.

STANNARD *v.* LEE.

*Copyright in Map—Registration—*5 *&* 6 *Vict. c.* 45—8 *Geo.* 2, *c.* 13—7 *Geo.* 3, *c.* 38—15 *Vict. c.* 12—*Practice—Costs of Appeal.*

12 Eq. 596
21 L.T. 373

The proprietor of the copyright in a map, whether forming part of or published independently of a book, cannot maintain a suit in respect of any infringement of his copyright until he has registered the map at *Stationers' Hall*, under the provisions of 5 & 6 Vict. c. 45.

Decision of *Malins*, V.C., reversed.

The costs of a successful appeal will not be given in the absence of misconduct on the part of the Respondent.

THIS was an appeal from a decision of Vice-Chancellor *Malins*, overruling a plea to the Plaintiffs' bill.

The bill stated that, in July, 1870, during the war between the King of *Prussia* and the Emperor of the French, the Plaintiffs, Messrs. *Stannard & Son*, printed and published a map which they had designed by the description of "No. 1. *Stannard & Son's* Panoramic Bird's-eye View of *France* and *Prussia*, and the surrounding countries likely to be involved in the war; with the railways and strategic positions of each army, and the great fortresses of the *Rhine* provinces." The price of this map was 2*s*.

The bill then stated that, in August, 1870, the Defendant, *Thomas Wales Lee*, published a bird's-eye view of the seat of war, which was advertised in the newspapers, under the following description: "*T. W. Lee's* Shilling Panoramic Bird's-eye View of the Seat of War, from special drawings by French and German artists, shewing

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the *Rhine, France, Prussia, Belgium,* and surrounding countries, rivers, roads, railways, fortresses, and strategic positions of each army, beautifully tinted."

The Plaintiffs alleged that the Defendant's map was an infringement of their copyright, and prayed for an injunction and payment of damages.

The Plaintiffs having filed their bill, obtained an *ex parte* injunction; and a motion by the Defendant to dissolve it was refused by Vice-Chancellor *Bacon,* the Vacation Judge.

The Defendant then filed a plea, that the Plaintiffs' map was a book within the meaning of 5 & 6 Vict. c. 45, and that it had not been registered at *Stationers' Hall,* as required by that Act.

The Plaintiffs set down the plea for argument, and the plea was overruled by Vice-Chancellor *Malins* on the 16th of November, 1870. The Defendant appealed from this decision, and also from the order of Vice-Chancellor *Bacon* granting the injunction.

Mr. *Fooks,* Q.C., and Mr. *W. Fooks,* for the Appellant:—

The case is governed by 5 & 6 Vict. c. 45. By sect. 2 of that Act the word "book" is defined "to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." By sect. 24 it is enacted that no proprietor of copyright in any book, which shall be first published after the passing of this Act, shall maintain any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the *Stationers' Company* of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid." The words "any copyright" are quite general; therefore, although the Plaintiffs may be proprietors of a copyright in a map, under the earlier Acts—8 Geo. 2, c. 13, and 7 Geo. 3, c. 38—they are still bound to comply with the provision for registration as a condition precedent to their enforcing their right: *Cassell* v. *Stiff* (1).

(1) 2 K. & J. 279.

L. JJ.
1871
STANNARD v. LEE.

Mr. *Cotton*, Q.C., and Mr. *L. Field*, for the Plaintiffs :—

From the time of Queen *Anne* there have been two parallel series of statutes, one relating to books proper, the other to works in the nature of prints. The statute 5 & 6 Vict. c. 45, belongs to the former series. Its 1st section refers to the book Acts, not to the print Acts. Evidently this Act was intended only to deal with books; and in the 2nd section "map" seems to be construed as referring to a map which forms part of a book by being an accompaniment to it, and referred to in it, but which is published separately. "Separate" only means materially separate. In *Bogue* v. *Houlston* (1), engravings forming part of a book were protected, though the provisions as to separate engravings had not been complied with. The old series of statutes relating to maps and engravings, including the 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, are recognised as still in force by the 15 Vict. c. 12, which extends their protection to lithographs; and the 25 & 26 Vict. c. 68, makes further provisions as to the same class of works. Even if we might have acquired a new right by registration under the 5 & 6 Vict. c. 45, still our old right is not taken away.

Sir W. M. James, L.J.:—

In this case, if the argument of Mr. *Cotton* were to prevail, it would lead at once to one of these two results—either there would be two kinds of maps—maps published separately and maps forming part of a book, with respect to which there would be two distinct laws of copyright—or else as to all maps there would be two distinct laws of copyright, one giving a conditional right of property with an unconditional right of action or suit, the other giving an unconditional right of property with a conditional right of action or suit. Either of these states of the law would be strangely inconvenient.

The 5 & 6 Vict. c. 45, s. 2, says that a "book" shall "mean and include every map, chart, or plan separately published;" and in the 24th section it proceeds to say that no proprietor of copyright in any "book," that is, of a "map, chart, or plan separately published," according to the definition given of a book, shall maintain an

(1) 5 De G. & Sm. 267.

action or suit in respect of any infringement of such copyright, unless he shall have previously registered such "map, chart, or plan" in the way prescribed by the Act. No very heavy onus on the proprietor—no very difficult step to take before he commences his suit. The words are plain and simple, and there is no reason for saying that the intention of the Legislature was different from that which is expressed by the words. The object of the enactment is very clear. Formerly maps had been considered artistic works, now they were to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are intended to give information in the same way as a book does. A chart, for instance, gives similar information to sailing rules; maps give instruction as to the statistics and history of the country portrayed; they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of *India*, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works, and to give them greater protection by bringing them under the law of copyright of literary works. There is no inconvenience in giving the natural meaning to the words of the statute, and there would be great inconvenience in the contrary construction. I think, therefore, the plea was well pleaded, and that the Plaintiffs are not entitled to maintain their suit until they have registered their map.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The words of the 5 & 6 Vict. c. 45, are too clear to admit of the interpretation contended for by the Plaintiffs. Before that Act was passed, maps were not within the statutes which gave a copyright to books, but were governed by the law of copyright of artistic works. It is impossible to read the Act without seeing that for some purposes, at least, there was to be a change in the copyright of maps, and that some maps were to be included under the term "books." So that for some purposes, at least, that Act altered the Acts of Geo. 2 and Geo. 3. In the 2nd section it expressly says that the word "book" is to include "every map, chart, or plan separately published." The only question is, whether this is a map separately published. Beyond all

L. JJ. 1871 STANNARD v. LEE.

question it is. It was, indeed, argued that the section was intended to be confined to maps which form substantially parts of books; but I think no such meaning can be got out of the words. The term "copyright" is thus defined in the 2nd section: "The sole and exclusive liberty of printing, or otherwise multiplying, copies of any subject to which the said word is applied." That must include maps separately published. It is impossible to hold that the words "copyright in any book" in the 24th section can have a different meaning from that which they have in the other sections.

Is this, then, a suit for restraining the infringement of the copyright of that which is called in the Act a "book?" I can entertain no doubt that it is. There is no such ambiguity in the statute as to entitle us to go into the question whether the natural construction of the words would produce an absurdity. But, in truth, I can see no absurdity at all in the natural construction. On the contrary, it appears to me a perfectly rational one. The plea must therefore be allowed.

SIR W. M. JAMES, L.J.:—

12 Eq 596

There will be no costs of the appeal. We have laid down the rule that we will never give the costs of a successful appeal where there has been no misconduct on the part of the Respondents.

Solicitor for the Plaintiffs: Mr. *M. T. Hodding.*

Solicitors for the Defendant: Messrs. *Wilson, Bristows, & Carpmael.*

In re BLOWER'S TRUSTS.

L. JJ.
1871
March 22, 23.

Will—Construction—Words—Nephews—Great-Nephews sharing with Nephews.

A testator gave the proceeds of the sale of an estate to his great-nephew *G. W.*, and to such other of his nephews and nieces as should be living at his own or his sister's decease equally. In one place in his will the testator called one of his great-nephews his nephew, but in all other places he called them great-nephews:—

Held (reversing the decision of *Stuart*, V.C.), that nephews and nieces must be confined to their primary signification, so as not to include great-nephews and great-nieces.

18 Eq 505
15 L D 529
538
17 L D 263
384-7

THIS was an appeal from a decision of Vice-Chancellor *Stuart*. The case is reported (1).

William Blower, who died in 1844, by his will, dated in December, 1842, devised an estate to trustees until his great-nephew *Langford Wilson* should attain the age of twenty-one years, upon the trusts therein expressed, and so soon as his said great-nephew attained that age, he devised the same unto his said great-nephew *Langford Wilson*, his heirs and assigns. The testator then devised another estate to the trustees, upon trust to pay out of the rents a certain annuity of £20, and as to and concerning the remaining part of such rents, and also as to and concerning the rents of the said hereditaments thereinbefore devised for the benefit of his said "nephew *Langford Wilson*," in case he should depart this life under the age of twenty-one years, upon trust to pay the same to the testator's sister *Sarah Langford* for her separate use; and after her death, he directed his trustees to sell and dispose of the said hereditaments, and also his said real estates thereinbefore devised for the benefit of his said great-nephew *Langford Wilson*, in case he should depart this life under the age of twenty-one years; and the testator declared the trusts of the net moneys which should arise from the sale of his said real estates as follows:—

"Upon trust to pay thereout all my mortgage debts which may be owing by me upon any part of my said real estates (it being my wish and desire that the estate hereinbefore devised for the benefit of my said great-nephew *Langford Wilson* shall be free from any

(1) Law Rep. 11 Eq. 97.

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part of such debts), and after payment thereof, upon trust to pay and divide the remainder of the said trust moneys unto and between my great-nephew *George William Wilson* and to such other of my nephews and nieces as shall be living at mine or my said sister's decease, in equal shares and proportions."

The estate was, after the death of the sister, sold, and the residue of the proceeds, after paying the mortgage debts and expenses, had been paid into Court. There were six nephews and nieces, children of *Sarah Langford*, and fourteen great-nephews and great-nieces of the testator.

George William Wilson died in 1859.

The nephews and nieces presented a Petition, praying that the fund in Court might be paid to them and to the legal representatives of *George William Wilson*.

The Vice-Chancellor held that the great-nephews and great-nieces were entitled to share with the nephews and nieces; and from this decision the nephews and nieces appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Freeling*, for the Appellants:—

The word "nephew" is used in its strict sense in every place in the will, except in one passage; and there it may very well have been used by inadvertence. There is, therefore, no reason for departing from the rule of construction, that the words ought to be read in their primary and usual signification. The only difficulty arises from the expression "to such other of my nephews and nieces;" but that may easily be accounted for. The testator was regarding each of his nephews and nieces as a separate *stirps*, and he looked on his great-nephew *George William Wilson* as representing the *stirps* of his deceased niece, and he therefore makes him share with his "other nephews and nieces."

[They referred to *Shelley* v. *Bryer* (1), *Sanderson* v. *Bailey* (2), *Crook* v. *Whitley* (3), *Stoddart* v. *Nelson* (4), *Weeds* v. *Bristow* (5), *In re Standley's Estate* (6), *James* v. *Smith* (7), and *Thompson* v. *Robinson* (8).]

(1) Jac. 207.
(2) 4 My. & Cr. 56.
(3) 7 D. M. & G. 490.
(4) 6 Ibid. 68.
(5) Law Rep. 2 Eq. 333.
(6) Ibid. 5 Eq. 303.
(7) 14 Sim. 214.
(8) 27 Beav. 486.

Mr. *Boger*, for Respondents in the same interest.

Mr. *Karslake*, Q.C., and Mr. *Badcock*, for the great-nephews and great-nieces:—

The case is governed by *James* v. *Smith* (1), where "nieces" was held to include great-nieces. In the present will the testator has explained his own meaning by using the word "nephew" in one place for "great-nephew," and by the expression "such *other* of my nephews and nieces." In addition to this he shews, by the expression "living at mine or my sister's decease," that he contemplated individuals of the class coming into existence after his death, but before the death of his sister, and these, considering the state of the family, would only be great-nephews and great-nieces.

[They also commented on the cases cited on the other side, and referred to *Hussey* v. *Lady Dillon* (2).]

SIR W. M. JAMES, L.J.:—

This is an appeal from the decision of the Vice-Chancellor Sir *John Stuart* upon the construction of the following gift:—[His Lordship read the clause in the will set out above.] The construction put upon these words by the Vice-Chancellor was, that the words "nephews and nieces" included not only nephews and nieces, but great-nephews and great-nieces, and that all those who lived at the death of the testator, and all those who came into existence between that time and the death of the sister then living, took *per capita* as tenants in common. It was not denied in the argument before us that the words "nephews and nieces" naturally and ordinarily mean the children of a brother or the children of a sister, and that they do not include more remote descendants. But it was said that we have here, in the testator's own words, a plain indication that he intended, by the description of "nephews and nieces," to include great-nephews and great-nieces, and that this is made clear by the words "such other." It was contended, and certainly not without force, that these words imply that the great-nephew, *George William Wilson*, was one of that class of which the nephews and nieces were "others." But before we alter the meaning of words in obedience to a supposed indica-

(1) 14 Sim. 214. (2) Amb. 603.

L. JJ. 1871 *In re* BLOWER'S TRUSTS.

tion of intention of the testator—before we deviate from the direct path in order to follow a light which appears to be held out by the testator—we must take care to be reasonably sure that it is a genuine light, and that we are not following the glare of a will-o'-the-wisp into a morass; and it is necessary, therefore, to consider, not merely these words, but the whole of the will, and the surrounding circumstances. Now, the frame of the testator's will was this: Having two great-nephews, the children of a deceased niece, and having also nephews and nieces, the children of his sister *Sarah Langford*, he gives, first of all, to one great-nephew, *Langford Wilson*, such a portion of his property as makes it reasonably clear that he selected him as his heir, and the principal object of his bounty. Having thus provided for his great-nephew *Langford Wilson*, he then gives another portion of his property to his sister *Sarah Langford* for life, and after her death there is a trust for sale, and then a trust to divide the proceeds of that sale, in the words which are the subject of this our present decision.

Now, in considering whether the testator used the words "nephews and nieces" as meaning great-nephews and great-nieces, it is important to observe that, throughout the will, except in one place, he carefully repeats the word "great-nephew," and this occurs ten times altogether, and in that one place which forms the exception, it appears to me reasonably clear that the word "great" slipped out by a mere clerical error. It is certainly most improbable that a testator should mean to combine nephews and nieces and great-nephews and great-nieces in one class, and make them all share equally.

It was strongly argued by Mr. *Karslake* that the Court had so often in other cases put a construction on words in a will which was repugnant to common sense, that it ought not now to be deterred by that consideration. But those were cases where the Court felt itself constrained, notwithstanding the apparent absurdity, to follow the actual literal meaning of the words, in obedience to the current of authorities.

Then we have this further consideration: The testator was giving his estate to his sister *Sarah* for life. If he meant, after her death, to give it to her children and grandchildren because

they were her children and grandchildren, it would be a most fantastical way of describing that class, to say "my other nephews and nieces." Again, it is very improbable that he should mention the name of his great-nephew, *George William Wilson*, for the mere purpose of merging him in the class of his uncles and aunts and his cousins. And it is also most improbable that, meaning to create a class which should include his great-nephew and heir *Langford Wilson*, he should begin the clause by putting at the head of it the younger brother, *George William Wilson*. On the other hand, let us consider whether we cannot find some other reasonable meaning for the words "such other of my nephews and nieces." *George William Wilson* and *Langford Wilson* were, in fact, standing by themselves, and were the children and representatives of one niece, and then the testator, having provided for that niece (so to speak) by giving a share to *George William Wilson*, as the representative of that niece, he gives the rest in shares to the "other nephews and nieces." We may easily conceive a father making a gift to "my grandson *George*" (being a son of a deceased son), "and to my other sons and daughters." By such an expression he would not mean to give the benefit to the grandsons and granddaughters, but, having clearly in his mind his deceased son as the object of his bounty, he would give it to the child of that deceased son, and to the other sons and daughters equally.

Therefore we are obliged to differ, with the greatest possible respect, from the opinion of the Vice-Chancellor. We determine the case simply upon the words of the will with reference to the authorities that were cited to us, that "nephews and nieces" mean nephews and nieces, unless there be something which makes it clear that some other meaning is attached by the testator to the words.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There is really no difficulty about the rule of construction which is to be applied to this will. It is clear that the words "nephews and nieces" *primâ facie* mean the children of brothers and sisters; but it is certainly not an uncommon thing in ordinary life for persons to call their great-nephews and great-nieces "nephews and nieces," and if there is

18 Eq 505

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anything in the language of the testator which shews that he has used "nephews and nieces" in the more general sense, then the Court will give that construction to his words.

Now, in the present case, for the reasons which have been stated at length by the Lord Justice, I am not only not convinced that the testator has used the words "nephews and nieces" so as to include his great-nephews and great-nieces, but I am convinced of the contrary; and having come to that conclusion, and looking at the circumstances under which he has made his will, and at the whole scope and object of the will, I apprehend it would be clearly wrong, by reason of the mere use of the word "other" (which certainly seems to me, to some extent, improperly and ungrammatically used), to hold that "nephews and nieces" include the great-nephews and great-nieces.

The order of the Vice-Chancellor must therefore be reversed.

Solicitors: Messrs. *Vizard, Crowder, & Co.*

L. JJ.
1871
March 23.

In re LEWES' TRUSTS.

Presumption of Death—Legatee.

Where a legatee has not been heard of for seven years, his death will be presumed; and the onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof, the legacy will be paid to the residuary legatee or the next of kin of the testator, as the case may be.

Order of *Malins*, V.C., affirmed.

JOHN LEWES, by his will, gave pecuniary legacies to his son *Thomas Lewes*, and gave the residue of his estate to Lieut.-Colonel *J. Lewes*. *John Lewes* died on the 20th of February, 1860. *Thomas Lewes* left *England* in 1858, and went to *Australia*, whence he wrote a letter, dated the 3rd of January, 1859, since which nothing had been heard of him. The legacies were paid into Court, and the residuary legatee petitioned for payment on the ground that, in the absence of proof that the legatee survived the testator, the legacy must be taken to have lapsed. The Vice-Chancellor *Malins* made an order for payment accordingly, considering himself bound by

In re Phené's Trusts (1). The case is reported (2), where the facts are more fully stated.

The next of kin of *Thomas Lewes*, one of whom had been appointed to represent him, appealed.

Mr. *Hardy*, Q.C., and Mr. *Bevir*, for the Appellants:—

We are prepared to dispute *In re Phené's Trusts* if necessary, but there is a material difference between the cases, for in this case the presumption is that the legatee survived, and it is for the residuary legatee to prove the contrary. The claimant is only a residuary legatee who takes under the will, and has no better title than the pecuniary legatee. *In re Green's Settlement* (3) shews that at the end of seven years there is a presumption of death, but there is no presumption of the precise period: *Doe* v. *Nepean* (4); certainly none that the legatee died the day after he was last heard of. Moreover, in this case the residuary legatee has applied for the money, and has to prove his case.

Mr. *Glasse*, Q.C., and Mr. *Bagshawe*, for the Respondent, were not called upon.

SIR W. M. JAMES, L.J.:—

This case is entirely covered by *In re Phené's Trusts*. The Vice-Chancellor says that he is bound by the rule in that case, that a legatee must establish his title by affirmative proof. The rule of law laid down in *Doe* v. *Nepean* is, that where any person has to prove the fact of death, he proves it by presumption of law from the lapse of time, but when he has to prove the time of death, he must prove it affirmatively, for there is no presumption that the death took place at any time in that seven years. If anything is to be presumed it would be, according to *Doe* v. *Nepean*, that the death took place on the first day of the seven years. Death is presumed from the person not being heard of for seven years, and whoever has to make out the case of death at any particular time must prove it by affirmative evidence, and those who claim under a person who is said to have survived

(1) Law Rep. 5 Ch. 139.
(2) Ibid. 11 Eq. 236.
(3) Law Rep. 1 Eq. 288.
(4) 5 B. & Ad. 86; 2 M. & W. 894.

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a particular period must prove the fact. Here the onus of proof is on those who claim under the legatee, and they have not succeeded. It is impossible to suggest any principle of common law or common sense by which it can make any difference whether the residuary legatee or the next of kin are the claimants.

SIR G. MELLISH, L.J.:—

I am of the same opinion. If at the end of seven years a person has not been heard of, the presumption is that he is dead, but there is no presumption as to when, during the seven years, he died. The person upon whom it rests to prove the affirmative, either that the legatee was alive or that he was dead at a particular period, must establish the proposition by distinct evidence, and not by shewing merely that he was alive at the beginning of the period. I do not think it signifies whether the Petition is presented by the residuary legatee or by the representatives of the particular legatee. It would be absurd to make the determination of the question depend upon that, as the executor might then have to keep the legacy for ever. The question is upon whom the onus really lies. The representatives of the legatee have to make out that the legatee was alive at the death of the testator, for the residuary legatee can say that he is entitled to everything except what is proved not to come to him. The rule is now clearly established on a right basis, and the appeal must be dismissed with costs.

Solicitors: Messrs. *G. L. P. Eyre & Co.*; Messrs. *Peacock & Goddard.*

LINFORD *v.* GUDGEON.

L. JJ.
1871
March 24.

County Court—Equitable Jurisdiction—Suit against Registrar—Transfer into adjoining District—19 & 20 *Vict. c.* 108, *s.* 21—28 & 29 *Vict. c.* 99, *s.* 21—30 & 31 *Vict. c.* 142, *s.* 8.

The 21st section of the *County Courts Act*, 1856 (19 & 20 Vict. c. 108), which provides that if an action be brought against an officer of a County Court the summons may be taken out in an adjoining district, is applicable to a suit in Equity as well as to an action at Law.

A bill was filed in the High Court of Chancery to redeem mortgaged property situate in the district of the *S.* County Court. The Defendant was the Registrar of that Court:—

Held (affirming the decision of *Stuart*, V.C.), that the suit might have been brought against the Defendant in the adjoining district of *H.*; and therefore the Court had jurisdiction, under the 30 & 31 Vict. c. 142, s. 8, to transfer the cause out of the High Court of Chancery to the County Court of *H.*

20 L.J. 678

THIS was an appeal from an order of Vice-Chancellor *Stuart*.

The bill was filed in the High Court of Chancery in *London* for the redemption of a messuage and premises at *Stonham*, in the county of *Suffolk*, of which the Defendant *James Gudgeon* was mortgagee. The amount secured by the mortgage was £400. The Defendant was Registrar of the County Court of *Stowmarket*, within which district the mortgaged premises were situate. The Plaintiff resided in *London*.

The Vice-Chancellor made an order, on the application of the Defendant, to transfer the cause from the Court of Chancery in *London* to the County Court of *Hadleigh*, which was an adjoining district to *Stowmarket*. The Plaintiff appealed from this order (1).

(1) The enactments upon which the question turned were the following:—

The 21st section of the *County Courts Act*, 1856 (19 & 20 Vict. c. 108), which Act amended the Act 9 & 10 Vict. c. 95, provided that, "If an action be brought against an officer of a County Court, the summons may issue in the district of which he is an officer, or in any adjoining district, the Judge of which is not the Judge of a Court of which the Defendant is an officer."

The *County Courts Equitable Jurisdiction Act*, 1865 (28 & 29 Vict. c. 99), which for the first time conferred an equitable jurisdiction on County Courts, contained this provision in sect. 21: "This Act and the Act 9 & 10 Vict. c. 95, and any Act amending or altering the same, shall be read and con-

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Mr. *Everitt*, for the Appellant:—

The Vice-Chancellor had no jurisdiction to order the transfer to the *Hadleigh* Court. The *Stowmarket* Court was the only proper Court in which to commence the action, being that in which the property was situate. The 21st section of the Act of 1865 (28 & 29 Vict. c. 99), which gives an option of issuing a summons against an officer of a County Court in an adjoining Court, applies only to actions at Law, and not to suits in Equity. If the Court has jurisdiction, this is not a case in which the transfer ought to be made. The Plaintiff considers that the cause will be more efficiently tried in *London*, and if at the hearing the Court still thinks he was wrong in filing the bill in the High Court of Chancery, he will be made to pay the costs.

Mr. *Phear*, for the Defendant:—

The word "action" was used in the 21st section of the Act of 1856, because at that time County Courts had Common Law jurisdiction only. But the effect of the 21st section of the Act of 1865 (28 & 29 Vict. c. 99) is to extend the operation of the 21st section of the Act of 1856 to suits in Equity. Therefore, the Court at *Hadleigh* was a Court in which the suit might have been commenced against the Defendant, and the transfer was rightly made to that Court.

Mr. *Everitt*, in reply.

SIR W. M. JAMES, L.J.:—

With respect to the question of discretion, we did not think it necessary to call on the Respondent's counsel, because if this

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strued as one Act, as if the several provisions contained in the said Acts referred to, not inconsistent with the provisions of this Act, were repeated and re-enacted in this Act."

By the *County Courts Act*, 1867 (30 & 31 Vict. c. 142), s. 8, it is provided that, "Where any suit or proceeding shall be pending in the High Court of Chancery, which suit or proceeding might have been commenced in a County Court, it shall be lawful for any of the parties thereto to apply at Chambers to the Judge to whose Court the said suit or proceeding shall be attached, to have the same transferred to the County Court or one of the County Courts in which the same might have been commenced; and such Judge shall have power upon such application, or without such application, if he shall see fit, to make an order for such transfer."

matter was within the jurisdiction of the Vice-Chancellor, this Court would require to be satisfied beyond all reasonable doubt that there had been a miscarriage of justice before it would interfere with his discretion; otherwise the effect would be to make the Act of Parliament a delusion and a snare, and to cause additional expense to the parties.

This is simply a question of jurisdiction, and I think the Court had jurisdiction to make the order. The Act of 1856 applies to actions at Common Law only, and it contains a provision as to officers of the Court who may be parties to actions. Then the statute of 1865, which first gave equitable jurisdiction to the County Courts, provided that certain Acts, including the Act of 1856, should be read as if the provisions, not inconsistent with the Act of 1856, had been re-enacted by that Act. This being so, and the same difficulty arising in the case of a suit in Equity against an officer of the Court as arose in the case of an action, there is nothing unreasonable in holding that the same remedy was intended to apply, and that the suit may be brought in an adjoining Court. Nor is there any hardship in this construction; for, supposing the commencement of a suit in an adjoining Court should in any case prove inconvenient, application may always be made to transfer the cause into the High Court of Chancery.

I am of opinion that the transfer was rightly made into an adjoining Court, the Judge of which is not the Judge of the Court in which the Defendant is an officer.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The real question is, how far the 21st section of the Act of 1865 incorporates the 21st section of the 19 & 20 Vict. c. 108. We find that the Act of 1865 makes no provision at all as to suits to which a Judge or officer of the Court is a party. I have very little doubt that the reason of this was that the Legislature, in conferring equitable jurisdiction on County Courts, considered that the sections in the former Act respecting actions to which they were parties were incorporated in the Act of 1865, and therefore need not be repeated. It would be too narrow a construction to hold otherwise. If the Appellants were right in their contention, the effect would be that no Judge or Registrar in

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a County Court would have the benefit of the equitable jurisdiction of the Court in any suit which could only be commenced either by or against him in his own district.

The appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *B. Hope.*

Solicitors for the Defendant: Messrs. *Burton, Yeates, & Hart.*

L. JJ. 1871 *Feb.* 24.

In re MEDICAL, INVALID, AND GENERAL LIFE ASSURANCE SOCIETY.

SPENCER'S CASE.

Company—Winding-up—Amalgamation of Companies—Life Assurance Company—Transfer of Business—Novation of Contract—Receipt of Bonus—Payment of Premiums.

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16 L.D. 314.
5 Ch.D. 260

In 1860 the *M. Life Insurance Company* became amalgamated with, and transferred its business to, the *A. Company.* By the agreement between the two companies it was provided that the policy-holders in the *M. Company* should be invited to substitute for their existing policies other policies to be issued by the *A. Company* on the same terms; that the policy-holders entitled to participate in profits who should accept new policies from the *A. Company* should, instead of their old rights, be entitled to share in the next and all subsequent bonuses to be declared by the *A. Company;* and that the policy-holders who should decline to accept substituted policies should be entitled to keep their old policies on foot by paying the premiums to the *A. Company,* who undertook the liabilities of the *M. Company* in respect thereof. A circular was sent to the policy-holders of the *M. Company,* informing them of the amalgamation and the agreement, and inviting them to accept substituted policies, or, in case the policies had been assigned, to have them indorsed by the *A. Company.*

In 1862 the *A. Company* declared a bonus; and a circular was sent to the policy-holders of the *M. Company* who were entitled to a participation in profits, announcing the bonus, and giving them the option of three ways in which they might take their share of the bonus.

S., a policy-holder, with participation in profits, in the *M. Company,* received the circular announcing the amalgamation with the *A. Company,* and did not apply for a substituted policy, but paid his subsequent premiums to the *A. Company.* He also received the circular announcing the bonus, and elected to take his share of the bonus in the form of reduced premiums, which he paid to the *A. Company* till it was ordered to be wound up. The *M. Company* was also ordered to be wound up, and *S.* claimed to prove as a creditor against the estate:—

Held (affirming the decision of *Bacon*, V.C.), that the acceptance by *S.* of the bonus from the *A. Company* effected a novation of his contract for insurance, and that he could no longer claim as a creditor of the *M. Company*.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, made in the winding-up of the *Medical, Invalid, and General Life Assurance Society*, by which he rejected the claim of *Charles James Spencer*, the holder of a policy on his life, with participation in profits, under the following circumstances :—

The company was reconstructed out of an older society, the deed of settlement being dated the 7th of February, 1844.

Amongst the provisions referred to in the arrangement were the following :—

Clauses 103 to 105 provided that the funds of the company should be divided into two portions—"The Guarantee Fund" and "The Life Assurance Fund," the former to be made up of the moneys paid for and arising from the sale and forfeiture of shares; the latter, of the produce of premiums and profits arising from the business of the company, the improvements and accumulations thereon.

Clauses 107 to 109 provided for the division of the profits on the Life Assurance Fund every five years into three parts; one of which was to be appropriated as a bonus to, and consolidated with, the Guarantee Fund; and the remaining two parts as a bonus in respect of endowments, and of policies entitled to profits.

In 1851 the society established branch offices in *Bombay*, *Madras*, and *Ceylon*, and the whole of the funds of the Indian branch were invested in Government, real, and Indian securities.

On the 27th of January, 1858, the directors of the Indian branch granted to Mr. *Spencer* a policy marked "Indian Branch" for his own life, with profits, the sum assured being 10,000 rupees, and the half-yearly premium 180 rupees.

In July and August, 1860, special resolutions were passed by the *Medical Society*, in pursuance of powers contained in the deed of settlement, recommending the dissolution of the society, and its amalgamation with the *Albert Life Assurance Company*. This amalgamation was carried into effect by articles of agreement dated the 21st of September, 1860, by which the business and funds of the *Medical Society* were transferred to the *Albert Company*, and the

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Albert Company undertook to discharge all claims upon the *Medical Society*, and to indemnify them against demands. The deed contained the following provisions as to the existing policy-holders in the *Medical Society*:—

That policy-holders in the *Medical Society* should be invited to substitute for their subsisting policies other policies to be issued by the *Albert Company*, and which substituted policies should be deemed and considered to be of the date of the original policy, and should be of the same amount, and subject to the like annual or other payments; and which substituted policies the *Albert Company* should grant to all persons willing to accept the same.

That the persons entitled to participate in the profits, and who should accept such substituted policies, or should otherwise accept engagements by the *Albert*, instead of preserving the rights that should belong to them as policy-holders in the *Medical Society*, should be entitled to share in the next and all subsequent bonuses to be declared by the *Albert Company* in the same manner as if the policies had been originally issued by the *Albert*.

That the policy-holders in the *Medical* who should decline to accept such substituted policies, should be entitled to keep on foot their then existing policies by paying the premiums thereon to the *Albert*, who should undertake the liabilities of the *Medical Society* in respect of such policies.

That the Life Assurance Fund should be transferred to trustees, and held by them upon trust for ten years from the date of the agreement for securing the obligations of the *Medical* in respect of policies granted by them; but a proportion of the trust funds should be transferred from time to time to the *Albert*, as such obligations ceased, either by the substitution of new policies or by other means; and at the expiration of the ten years, the remainder, if any, of such funds should be transferred to the *Albert*, and whether any of the said obligations should be subsisting or not.

That the *Albert Company* should discharge all claims upon the *Medical Society*, and indemnify that company against all obligations of every kind which it might have entered into, except immediate claims and demands, which were to be paid by the *Medical Society*.

On the 26th of September, 1860, it was determined that the

business should be carried on under the name of the *Albert and Medical Life Assurance Company.*

On the 1st of October, 1860, a circular was addressed by the directors of the *Medical Society* to their English policy-holders informing them of the amalgamation, and pointing out the advantages which they would obtain by accepting policies in the *Albert Company.*

In November and December, 1860, a notice was published in some of the Indian and *Ceylon* newspapers, of which the following is a copy :—

"*Albert and Medical Life Assurance Company.*
"Head Office: *Pall Mall, London.*
"Established 1838. Indian Branch.
"Preliminary Notice.

"The directors beg to announce that the business of the *Medical, Invalid, and General Life Assurance Society* has been amalgamated with that of the *Albert Life Assurance,* and that henceforth the operations of both companies will be carried on under the above name or style. The combined office, which is now one of the largest life assurance institutions in the world, has an annual income from premiums of twenty-two lakhs of rupees; its accumulated fund exceeds fifty lakhs, while the new business from premiums is progressing at the rate of two-and-a-half lakhs per annum.

"The Indian branch will continue under the same administration as heretofore. A secretary is on his way to *Madras,* to act with the board there, while a board of directors and secretary are also about to be appointed for *Bombay.* The funds of the branch will be put up in trust as an additional security to policy-holders in this country; all claims occurring after the 21st of September last, the date of the amalgamation, being paid from the funds of the new association.

"Policies in this company will be issued free from expense, in exchange for those in the *Medical Society,* without any alteration in the terms and conditions of the latter; and if any policy-holder should have assigned his policy by any legal instrument, in settlement, mortgage, or otherwise, so as to render substitution difficult, an indorsement will be made on the policy, securing the responsi-

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bility and guarantee of this company for the fulfilment of the existing contract.

"The directors in this branch would recommend policy-holders in the *Medical* to convert their policies into policies of this company, or to have them indorsed, as above suggested. Under the deed of settlement the *Medical* profits are not divisible until 1863, but under that of this company profits are divisible in 1861, and future estimates of profits will be made trienially thereafter; a proportion equal to five-sixths of the profits being, at the option of the assured, paid in cash, added to the policy, or applied in diminution of future premiums. By the combination of the two companies a very considerable saving to the expenses of management will be secured, which must materially increase the bonus-giving power of the amalgamated company, and thus afford improved prospects to the assured."

On the 28th of November, 1860, a circular was issued from *Calcutta* to the policy-holders in *India*, directing the attention of the persons addressed to a notice at the back, which was a copy of the last-mentioned notice. The circular contained the following paragraph:—

"In the event of your electing to take out a fresh policy in the *Albert and Medical Assurance Company*, please fill up and return to me the subjoined form, marked A. [which was inclosed], surrendering your existing *Medical* policy at the same time, when a new policy will be issued immediately therefor."

Shortly after this date the name of the amalgamated company was again changed to "*The Albert Medical and Family Endowment Life Assurance Company.*"

By two deeds, dated the 8th of October, 1860, and the 14th of March, 1861, the portions of the Life Assurance Fund of the *Medical Society* which were in *India* and *England* were respectively assigned to trustees upon trust to satisfy all claims in respect of policies issued by the *Medical Society* before the amalgamation, and to indemnify the directors and the shareholders of that company against any liability arising therefrom.

Mr. *Spencer* never obtained a policy from the *Albert Company*

in substitution for his policy granted by the *Medical Society*, but paid his premiums at the offices of the *Albert Company*.

In January, 1861, the form of receipt given was the same as that of the receipts given by the *Medical Society*—which were headed "*Medical, Invalid, and General Life Assurance Society*"—except that the words "Invalid and General" were struck out with a pen, and the words "Albert and" were prefixed; and also, after the word "issued," were inserted the words "by the *Medical, Invalid, and General Life Office*."

In January, 1862, the heading became "*Albert Medical and Family Endowment Life Assurance Company*," and for the word "Office" was substituted "Assurance Society."

In July, 1864, the heading was changed to "Indian Branch, *Albert Life Assurance Company*."

On the 24th of December, 1862, a bonus was declared by the *Albert Medical and Family Endowment Company* for the three years ending the 31st of December, 1861.

In June, 1863, a printed circular, signed by the acting manager, was addressed to Mr. *Spencer* in the following terms:—

"Indian Branch,

"*Calcutta*, June, 1863.

"Sir,—I have the pleasure to send you, by desire of the board, a report of proceedings at the annual meeting of proprietors of this company, held on the 24th of December last, by which you will perceive an allotment of the surplus profits of the company has been made to the asssured.

"The share pertaining to the above-mentioned policy may be applied in either of the following ways: 1st. In adding to the amount assured, when payable, the sum of rupees. 2nd. In the present payment of rupees. 3rd. In reducing the premium payable during the three years subsequent to this year. 4th. In reducing all premiums subsequent to this year. I shall be obliged by your informing me which of the above modes you select. Should I not hear from you before the 31st of August next, it will be assumed that you adopt the first of the preceding modes, and the sum annexed under No. 1 will be added to the sum assured."

Annexed to this circular was a report, which contained the results of the balance-sheet up to December, 1861, and stated that

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Professor *De Morgan's* report upon the valuation of the company's assets and liabilities was accompanied by his recommendation, upon which the directors had acted, that they should declare a bonus, or set apart the sum of £50,000, "as belonging to the policy-holders assured with profits;" also that there had been some delay by reason of the labour involved in collecting the data of "the several businesses transferred to the company, and in making the necessary valuations."

In reply to the circular, Mr. *Spencer* wrote a letter to the *Albert Company,* in which he elected to take the sum allotted to him by way of bonus in reduction of all future premiums; and accordingly the sum payable half-yearly on his policy was reduced, and he paid his premiums thenceforth to the *Albert Company* at the reduced rate.

On the 17th of September, 1869, an order was made to wind up the *Albert Company;* and on the 18th of December, 1869, a similar order was made with respect to the *Medical Society.*

Under these circumstances Mr. *Spencer* claimed to prove as a creditor of the *Medical Society,* and to have a charge upon the Indian and English funds representing the Life Assurance Fund of the *Medical Society.* The Vice-Chancellor was of opinion that Mr. *Spencer* had, by his conduct, adopted the liability of the *Albert Company,* and relinquished his claim upon the *Medical Society.* He therefore dismissed the claim; but as it was a representative case, directed that the costs should come out of the estate. From this decision Mr. *Spencer* appealed.

The arguments before the Vice-Chancellor were partly directed to the question of the validity of the amalgamation of the two companies; but in the Court of Appeal the case entirely turned upon the question whether Mr. *Spencer* had accepted the liability of the *Albert Company.*

Mr. *Fry,* Q.C., and Mr. *J. D. Bell,* for the Appellant:—

Mr. *Spencer* not only claims as an ordinary creditor of the *Medical Society,* but he claims to have a charge upon the two funds assigned to the Indian and English trustees. His claim turns upon the question whether he had ever agreed to accept the liability of the *Albert Company* instead of that of the *Medical Society.* This

depends upon the intention of the parties, and the present case differs from most previous cases in the fact, that the intention of both parties is so clearly manifested by the documents. The agreement for amalgamation expressly provided that the old policy-holders should be induced to accept substituted policies of the new company, and that if they declined to do so, they were to pay their premiums notwithstanding to the *Albert Company*, who, for that purpose, were the agents of the *Medical Society*. The same intention is shewn on all the circulars and notices, which offer inducements to the shareholders to come in and exchange their policies. Mr. *Spencer* declined to accept the substituted policy, for he never sent in his policy to be exchanged, but simply paid his premiums to the *Albert Company*. Therefore, whatever may have been held to be the effect of paying premiums in other cases, it could not have amounted to a novation here, because it was strictly consistent with a refusal to give up the old liability. The fact that the old policy-holders had the trust fund in *England* and *India* to look to, raises a presumption against their intention to accept the new liability in lieu of the old.

With respect to the acceptance of the bonus, that circumstance is not conclusive against us. Mr. *Spencer* had a "participating policy," and would have been entitled to a bonus if the *Medical Society* had gone on; and he may well have supposed that this bonus was given him in the capacity of one of the *Medical* policy-holders. The terms of the notice respecting the difficulty the actuary had in collecting the data of the several businesses would confirm him in that idea.

They referred to the following cases: *In re Family Endowment Society* (1); *In re Times Life Assurance and Guarantee Company* (2); *In re Anchor Assurance Company* (3).

Sir *Roundell Palmer*, Q.C., Mr. *Wickens*, and Mr. *Lemon*, for the official liquidator, were not called upon.

SIR G. MELLISH, L.J.:—

This is a claim made by Mr. *Spencer* against the *Medical Invalid Company*, which Vice-Chancellor *Bacon* held not to be tenable,

(1) Law Rep. 5 Ch. 118. (2) Law Rep. 5 Ch. 381.
(3) Law Rep. 5 Ch. 632.

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upon the ground that Mr. *Spencer*, under the circumstances, had accepted the *Albert Company* as his debtor in lieu and instead of the *Medical Invalid Company*. The case was decided by the Vice-Chancellor upon the authority of *In re Anchor Assurance Company* (1) and *In re Times Life Assurance and Guarantee Company* (2); and those cases, as it appears to me, do establish a general rule that, where, on the amalgamation of two companies, notice is given to a policy-holder of that fact, and in substance notice is given to him that he has his election whether he will choose to take a policy or liability of the new company in lieu and instead of the policy of the original company who were liable to him, even although he does not in terms assent to the novation by taking out a new policy, or by having it indorsed, or by entering into an express agreement, yet, if he acts upon it, and takes the benefits which he could only be entitled to receive upon the assumption that he had assented to it, that will be evidence on which the Court may find, and, unless there is something to contradict it, ought to find, that he has agreed to take the liability of the new company in substitution for that of the old one.

The first question, then, is, what notice Mr. *Spencer* had. [His Lordship then referred to the advertisement in the Indian papers and the circulars sent to the Indian policy-holders, and continued:—] These documents gave full notice to Mr. *Spencer* that the two companies had amalgamated, and that, in point of fact, the whole of the assets and the whole of the premiums would be received by, and would belong to, the new company. They also gave him direct notice that there would be a division in the new company, of which he would have the benefit, if he chose to join it, of profits up to 1861, and that it would be on the basis of five-sixths of the profits going to the policy-holder, and that they would have an option whether that was paid in cash, added to the policy, or applied in diminution of the future premiums; and the same documents tell him most clearly that he cannot get those advantages unless he agrees to take a policy in the *Albert Company*. They state that the bonuses are equal to five-sixths, divisible every three years, instead of two-thirds divisible every five years, as in the *Medical Company*. Then they state other advantages which he

(1) Law Rep. 5 Ch. 632. (2) Law Rep. 5 Ch. 381.

would receive, and say that "the directors here and in *England* recommend the acceptance of policies in the *Albert* and *Medical* in lieu of those of the *Medical Office*."

Now Mr. *Spencer* did not answer that circular; and I agree that he could not be deemed, from simply not answering the circular, to have assented to it. On the contrary, I should be disposed to say that he remained a policy-holder in the *Medical Company*. But it has been very strongly argued that the effect of this circular was this, that there were two modes, and two modes only, by which a policy-holder in the *Medical Company* could become a holder in the *Albert* in lieu of the *Medical*, namely, either by taking out a new policy in the *Albert* or sending his policy to be indorsed: and it has been urged that the *Albert* made that provision expressly, because, in all their own policies there was a limitation which confined the policy-holders to the funds of the society, and to the unpaid calls, and relieved them from unlimited liability; and it was said that they would not have that advantage unless the policy-holder took out a new policy.

Now, I may observe that, if they got that advantage in the case of a person who simply sent his policy to be indorsed, I do not understand why they should not get the same advantage, if it is made out on any other grounds, that the policy-holder in the *Medical* had agreed to accept the policy in the *Albert*. No doubt they did point out two modes, and two modes only, by which a policy-holder in the *Medical* could become a policy-holder in the *Albert*. But although they did that, yet it was quite open to the *Albert Company*, and to a policy-holder in the *Medical*, to enter into an agreement for novation in any other way in which they might legally make it. There is no rule of law that such an agreement necessarily requires a new policy, or an indorsement on the old policy. Supposing the policy-holder had written a letter in terms to the *Albert*, saying, "I have received your circular, and I agree to accept a policy in the *Albert* in lieu of the policy in the *Medical*," could anybody doubt that that would amount to a contract between him and the *Albert* to issue such a policy, and that a contract to issue a policy—at any rate, in this Court, and I think, also, in a Court of Law—would be every bit as good as an actual policy? Then, may they not enter into such a contract by impli-

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cation? May they not do such acts as to raise a natural inference that they have entered into such a contract?

I am of opinion that, although a policy-holder in the *Medical* has not in terms accepted the offer made to him, if afterwards the *Albert* sends a circular offering to give him a bonus, which he could only be entitled to, and which he must know he could only be entitled to, on the assumption that he was a policy-holder in the *Albert*, by sending him that circular the *Albert* makes an offer to him to effect a novation without the ceremony of issuing a new policy, or having an indorsement on the old policy. And I am of opinion that if he accepts that bonus, and accepts it with a fair understanding and knowledge that he is taking what he could not be entitled to, except on the assumption that he had become a policy-holder in the *Albert*, then he accepts the offer of a novation so made to him.

Now, the question is, whether this circular does really treat him as a policy-holder in the *Albert*, and does really offer to pay him a bonus on the assumption that he is a policy-holder in the *Albert;* or whether it is open to what has been strongly contended for, namely, that it is consistent with this, that, as a policy-holder in the *Medical* who had refused and declined to become a policy-holder in the *Albert*, he, nevertheless, might be entitled to some bonus which had been possibly earned by the *Medical*. I confess I cannot see how the *Medical*, having ceased to carry on business, could possibly earn any bonus. But, at any rate, let us look at the circular, and see whether this contention is open to him. [His Lordship then read the circular of June, 1863, and continued:—] Now, is it possible to say that that is not a circular which, on the face of it, professes to be a circular to nobody else than the policy-holders in the *Albert*, offering them a share in the profits which had been made by the *Albert?* I think it so appears by the accounts on the other side of it up to the year 1861; and it appears to me clear that Professor *De Morgan's* detailed report, referred to in the annexed report, related exclusively to the assets and liabilities of the *Albert*, and to the policy-holders of the *Albert* assured with profits in the *Albert*. Then it was stated that "there had been some delay in arriving at this result by reason of the vast labour involved in collecting the data of the several businesses

transferred to the company, and in making the necessary valuation." There is nothing in that to shew that, as respects each amalgamated company, there had been a separate estimate of the profits made by that company, and that the policy-holders in that company were to have the profits of that. All I understand it to mean is, that from the numbers of new companies which they had taken up, the calculation had become excessively difficult, and had taken a long time; but when they had once arrived at what the profits were, they were divided among the policy-holders in the *Albert* wholly irrespective of the question whether those policy-holders were original policy-holders in the *Albert*, or had been policy-holders in the former company.

It appears to me, therefore, that this circular is plain on the face of it. I cannot think Mr. *Spencer*, or anybody else who read it, could possibly doubt that what was offered to him was, that he should be treated as a policy-holder in the *Albert* who was entitled to his share in the profits they had made by way of bonus. That being so, he answers it, and agrees to accept the offer of having a reduction of premium, and from that time until the *Albert* stopped payment he paid that reduced premium, and that reduced premium was accepted. It appears to me that is complete evidence of novation. We have the *Albert Company* on the one hand, and Mr. *Spencer* on the other, treating each other on the footing that Mr. *Spencer* is insured with the *Albert*.

I think, therefore, that the judgment of the Vice-Chancellor is quite right, and that this case cannot be distinguished from *In re Anchor Life Assurance Company* (1) and *In re Times Life Assurance and Guarantee Company* (2). Indeed, I am not sure that it is not a stronger case. The order of the Vice-Chancellor must be affirmed.

SIR W. M. JAMES, L.J., concurred.

Solicitor for the Appellant: Mr. *Lattey*.
Solicitor for the Official Liquidator: Mr. *J. Kendall*.

(1) Law Rep. 5 Ch. 632. (2) Law Rep. 5 Ch. 381.

L. JJ.
1871
Feb. 24.

In re MEDICAL, INVALID, AND GENERAL LIFE ASSURANCE SOCIETY.

GRIFFITH'S CASE.

Company—Winding-up—Amalgamation of Companies — Life Assurance Company—Transfer of Business—Novation of Contract—Indorsement of Policy —Payment of Premium.

16 L.T. 314

In 1860 the *M. Life Assurance Company* became amalgamated with and transferred its business to the *A. Company*. By the agreement between the two companies, it was provided that the policy-holders in the *M. Company* should be invited to substitute for their existing policies other policies to be issued by the *A. Company* on the same terms, and that the policy-holders who should decline to accept substituted policies should be entitled to keep their old policies on foot by paying the premiums to the *A. Company*, who undertook the liabilities of the *M. Company* in respect thereof. A circular was sent to the policy-holders of the *M. Company* informing them of the amalgamation and the agreement, and inviting them to accept substituted policies; or, in case the policies had been assigned, to have them indorsed by the *A. Company*.

G. effected policies of assurance on his life, without participation of profits, in the *M. Company*, which were afterwards assigned to *R.* The circular announcing the amalgamation of the companies was received by *R.* In 1865 the secretary of the *A. Company* applied to *R.* to send in his policies to be indorsed, which *R.* did; and the secretary sent him a form for his signature, by which he was to assent to the transfer of the liability upon the policies to the *A. Company*. *R.* refused to sign this document, and the policies were accordingly returned to him without indorsement. He continued to pay the premiums to the *A. Company* till it was wound up.

The *M. Company* was also ordered to be wound up, and *R.* claimed to prove as a creditor against the estate :—

Held (reversing the decision of *Bacon*, V.C.), that no novation of the contract for insurance had been effected, either by payment of premiums or by sending in the policies for indorsement, and that *R.* was entitled to claim as a creditor against the *M. Company*.

THIS was an appeal from an order made by Vice-Chancellor *Bacon* in the winding-up of the *Medical, Invalid, and General Life Assurance Society.*

The Appellants were *Thomas Rawlinson, Miles Stringer*, and *Charles James Dimond*, as assignees of Major *Julius George Griffith.*

On the 2nd of May, 1855, General *Griffith* effected a policy with the above-mentioned company on his own life, without participation

in profits, numbered 7966, for £1500, subject to a half-yearly premium of £46 16*s.* On the same day he effected another policy, without profits, numbered 7967, for £1000, at a premium of £31 4*s.*

On the same day Messrs. *Rawlinson*, *Stringer*, and *Dimond* effected with the society a third policy, numbered 7968, on the life of General *Griffith*, without profits, for £1000, at a premium of £31 4*s.*

By an indenture, dated the 3rd of August, 1855, the two first-mentioned policies, and the sums of £1500 and £1000 thereby secured, were assigned by General *Griffith* to Messrs. *Rawlinson*, *Stringer*, and *Dimond;* and on the following day notice of the assignment was given to the society.

In the year 1860 the *Medical Society* transferred its business to, and became amalgamated with, the *Albert Life Assurance Company*. The circumstances under which this was done, and the terms of the deed of settlement, are stated in the report of *Spencer's Case* (1).

Notice of the amalgamation was sent to the English policy-holders of the *Medical Society* in a circular letter, dated the 1st of October, 1860, which contained the following passage:—

"The *Albert Company* have agreed to issue policies in exchange for those of this society at the same rate of premiums as that now payable on the policies effected in this office, without any alteration of the terms or conditions of the present policies; and if any policy-holder should have assigned his by any legal instrument or otherwise, so as to render substitution difficult, an indorsement can be made on the policy securing the full responsibility and guarantee of the *Albert and Medical Life Assurance Company* for the fulfilment of the existing contract."

The Appellants paid the premiums on their policies at the office of the *Albert Company*, but did not obtain new policies or send in the old ones for indorsement.

On the 23rd of February, 1865, the secretary of the *Albert Company* sent the following letter to Mr. *Dimond*:—

"*Medical Policies*, 7966–8.

"As the above policy, issued by the *Medical Invalid Society*,

(1) *Ante*, p. 362.

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which transferred its business to this office in 1860, has not yet been sent in, either for exchange or for the purpose of being indorsed with an admission of this company's liability, I shall be much obliged if you will kindly forward it to me at your early convenience, to assist us in getting the outstanding policies properly indorsed or exchanged, as may be preferred by the holders."

On the 24th of February, 1865, Mr. *Dimond* replied as follows:—

"As requested by you, we now send herewith two policies of the *Medical, Invalid, and General Assurance Society* on the life of General *Griffith*, numbered 7966 and 7967, dated respectively the 2nd of May, 1855, and we shall be glad to receive them back as soon as the necessary indorsements have been made thereon."

On the 27th of February the secretary again wrote to *Dimond*, in the following terms:—

"I am in receipt of your letter of the 24th instant, and the above policies; and I herewith inclose certificates requiring the signatures of the three assignees.

"You will perceive there are two certificates to each policy, one being appended to the policy when duly signed, and the other kept at the office.

"Kindly return the certificates when signed."

The certificates were in the following form:—

"In consideration of *T. Rawlinson*, *M. Stringer*, and *C. J. Dimond* having agreed to the transfer to the *Albert Medical and Family Endowment Life Assurance Company* of the liability under the policy granted by the *Medical, Invalid, and General Life Assurance Society* for the sum of £ on the life of *J. G. Griffith*, and to pay to the same company all the future premiums payable according to the said policy as they become due, and to observe and perform all the stipulations comprised in the said policy, and on the part of the said *T. Rawlinson*, *M. Stringer*, and *C. J. Dimond*, to be observed and performed: We, on the part of the *Albert Medical and Family Endowment Life Assurance Company*, do hereby agree to observe and perform all the stipulations contained in the said policy, and on the part of the *Medical, Invalid, and General Life*

Assurance Society to be observed and performed:" [Then followed a proviso, limiting the liability to the subscribed capital and other funds of the *Albert Company*.]

On the 2nd of March, 1865, Mr. *Dimond* wrote to the secretary, acknowledging the receipt of the letter inclosing the certificates. He further said:—

"As the assignees were no parties to the transfer of the policies to the *Albert Company*, they cannot sign any document which states that they agreed to such transfer. I understood, from your letter of the 23rd ultimo, that your object in applying for the policies was, that they might be indorsed with an admission of the liability of the *Albert Company*. It did not contain any reference to a memorandum to be signed by the assignees. I will, therefore, thank you to return the policies to me, with an indorsement of such admission."

On the 4th of March, 1865, the secretary replied:—

"As the form of memorandum sent is the only one we place upon *Medical* insurance policies, I herewith return the above.

"Should you so desire, we shall be happy to exchange them for policies in this company, the terms and conditions of which would be the same as the *Medical* policies; and as they would each of them contain a reference to the *Medical* policy, they would in every respect be of the same value."

On the 6th of March, Mr. *Dimond* acknowledged the receipt of the policies, which were returned without any indorsements thereon.

The premiums were regularly paid at the office of the *Albert Company* till it was wound up.

General *Griffith's* life was now uninsurable from advanced age and ill-health.

The *Albert Company* and the *Medical Society* were both afterwards ordered to be wound up.

The assignees claimed to prove against the *Medical Society* for the sum of £3500 assured by the three policies, or, in the alternative, for the amount of premiums which had been paid.

The Vice-Chancellor *Bacon* was of opinion that the assignees

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had accepted the liability of the *Albert Company*, and refused the claim; and the assignees appealed from this decision (1).

(1) 1870. Dec. 21.

SIR JAMES BACON, V.C., after reviewing the facts and the evidence, continued as follows:—

It cannot be doubted, on this evidence, that the transfer by the *Medical Company* of their assets to the *Albert Company*, and the engagement of the latter to perform the obligations of the *Medical Company* towards their policy-holders, were complete between the two companies, nor can it be questioned that this state of things was made known to the claimants. It is also no less clear, upon the authority of the cases which have been referred to, that the *Albert* had become liable to the claimants, and might have been compelled to satisfy their demands upon the policies, if the *Albert* had (as they never have) expressed or intimated any disposition to evade the liability they have assumed. So far, therefore, I cannot but consider that the case is covered by the decisions in the *Times Company* (Law Rep. 5 Ch. 381) and *Anchor Company* (Law Rep. 5 Ch. 632); and I therefore consider it unnecessary to refer particularly to the general arguments which have been adduced.

But then it is insisted, on the part of the claimants, that the communications between the *Albert Company* and the claimants in 1865 present a new feature, and give a right to the claimants wholly unaffected by the decisions referred to; and, especially, that by the letter of the 2nd of March, 1865, they had informed the *Albert Company* that "they were no parties to the transfer of the policies to the *Albert Company*, and that, therefore, they could not sign any document which stated that they agreed to such transfer;" and that they, consequently, insisted upon, and obtained, the re-delivery to them of the policies.

The question is, therefore, reduced to this: Does the refusal of the claimants to accept the written acknowledgment by the *Albert* in any other terms than such as they prescribed make any substantial difference in the case? I must say that I think it makes no such difference; and that no reason exists why it should. For, from the very nature of the transaction, the claimants were apprised by the *Albert* (who had for years theretofore received the premiums by which the policy was periodically renewed), that that company acknowledged their liability. The only dispute which ensued was as to the form in which the written acknowledgment should be expressed. Both parties stood to their own notions on that subject; nothing was done on either side to vary the rights and *status* of each. It would be far too much to say that, because the claimants refused to write or sign anything which the *Albert* proposed to them, they could alter or affect anything that had been done by or between them and the *Albert* up to that time. Upon the invitation of the *Albert* that the policies might be sent to them, "for the purpose of being indorsed with an admission of the company's liability," the policies are sent, with a request that they may be returned "so soon as the necessary indorsements have been made thereon." If they had been returned with a simple indorsement acknowledging the liability, I must assume that the claimants would have been content; and I cannot hold that, because the parties differed as to the form in which the acknowledgment was to be expressed, a different state of circumstances arose. If

Mr. *Fry* Q.C., and Mr. *Caldecott*, for the Appellants:—

This case differs from *Spencer's Case*, inasmuch as the claimants received no bonus, and in express terms refused to discharge the *Medical Society* from the liability. The notices were sent in to be indorsed, but when the claimants found that their indorsement involved a discharge of the *Medical Society*, they declined to proceed with the matter.

Mr. *Wickens*, and Mr. *Lemon*, for the official liquidator:—

The novation was complete when the policies were sent in to be indorsed. The only dispute was about the form. It was similar to a dispute about the conveyance in question between vendor and purchaser.

SIR W. M. JAMES, L.J.:—

With all respect for the judgment of the Vice-Chancellor, this appears to me to be a reasonably plain case. It seems to me beyond all question that, whatever may be said as to the effect of continuing to pay premiums for a great number of years—although I am not myself disposed to attach very much importance to such payment in any case—the payment of premiums for any number of years, where there is a particular contract between the two companies, cannot have the slightest operation.

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this had been the meaning of the claimants, I think that in all reason and fairness they ought to have said something which would have made such meaning apparent, and that they ought not to have led, as by their mere silence they did lead, the *Medical* as well as the *Albert* to believe that they were satisfied with matters as they stood. It does not, however, rest there, because for more than four years afterwards they received notices from the *Albert*, apprising them that the premiums had become due, and were payable to the *Albert*, and they duly complied with the requisition by paying the premiums as they from time to time became due.

I am of opinion, therefore, that upon the facts in evidence, and especially by reason of the payments made to the *Albert*, as well before as after 1865, the claimants did from time to time renew with the *Albert* that conditional contract which they had originally made with the *Medical*; and, as they cannot have claimed, nor do they claim, to have two distinct debtors in respect of one and the same contract, that they have, with full notice and knowledge, and by conduct unequivocal, substituted the *Albert* as their only debtors, and have relinquished all right against the *Medical*.

The claim, therefore, must be dismissed.

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The agreement between the two companies, which is one of the most honest deeds of amalgamation that I have ever seen, provides expressly for the policy-holders who shall not accept the liability of the new company. It provides that the policy-holders, who shall decline to accept such substituted policies, shall be entitled to keep on foot their then existing policies by paying the premiums thereon to the *Albert Company*, who shall undertake the liabilities of the *Medical, Invalid, and General Life Assurance Society* in respect of such policies. That was the bargain between the two companies, notice of which was given to the policy-holders. Then these policy-holders pay their premiums at the office of the *Albert*, that being the very place at which, according to the deed of agreement between the two companies, they were to pay them. I cannot think anything is to be attributed to the payment of the premiums under such circumstances.

Then there comes a transaction consisting of an application to the holders of these policies to send them in for indorsement. Now it appears to me that, if they had sent them in for indorsement, and they had been returned indorsed, it would have been impossible for these gentlemen to escape from what I conceive to be the true meaning of the notice sent to all the policy-holders as to the effect of the indorsement; that is to say, the indorsement would have been in substitution for a new policy, and would have had the same effect as a new policy. If it had stood there, the matter would have been completed. But that is not what took place. When the policy-holders sent in the policy for indorsement, the secretary said: "We must have a memorandum of a particular kind." It was not only to be assented to, but it was to be signed by them. Thereupon the policy-holders say: "That is not what we meant. When we sent in the policies to you, we had no intention of saying that we agreed to any transfer of liability. We thought we were going to get a simple indorsement by the *Albert Company*, giving us a fresh liability." The company, through their secretary, assented to that view of the case, namely, that the assignees had been under a misapprehension as to what the substance of the transaction was to be, and accordingly returned the policies to them unindorsed, with an intimation that if they should alter their mind, and desire to have a new policy of the *Albert*, they

might have one. That offer they never accepted, and the whole thing was as completely at an end in law as it was in honesty and good faith between the two parties. Therefore I am of opinion that there was no novation, either by the payment of the premiums or by what took place with respect to the proposed indorsement on the policy.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitor for the Appellants: Mr. *C. J. Dimond.*
Solicitor for the Official Liquidator: Mr. *Kendall.*

In re ALBERT LIFE ASSURANCE COMPANY, AND OTHER COMPANIES.

L. J. J. 1871 *March* 1, 2.

Company—Scheme of Reconstruction—Sanction of Court—Jurisdiction—Companies Act, 1862, *ss.* 95, 159, 160—*Joint Stock Companies Arrangement Act*, 1870.

The *A. Life Assurance Company* purchased the businesses of several companies, and indemnified them against their liabilities. Some of the policy-holders of the amalgamated companies accepted the liability of the *A. Company*, and some did not. Afterwards the *A. Company* and the other companies were ordered to be wound up. A scheme of reconstruction was proposed for the sanction of the Court, under which the contributories of the *A. Company* and the other companies were to pay certain contributions; and the assets of the *A. Company*, and also the contributions when called up, were to be handed over to a new company, which was to take the business and pay the policies when they arrived at maturity with a deduction of £5 per cent. on their amounts.

The scheme had been accepted by a majority of three-fourths in value of the creditors present at meetings of each of the companies, and also by a large majority of the shareholders:—

Held, that the Court had no jurisdiction to sanction the arrangement.

Such a scheme is not a sale within the 95th section of the *Companies Act*, 1862.

The Court has no power, under the 159th and 160th sections of the *Companies Act*, 1862, to sanction an arrangement by which a minority of creditors or contributories are bound to accept a compromise against their will.

Considering the different value of policies of the same amount on different lives, and considering that it was uncertain in what cases there had been a

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novation by the policy-holders of the amalgamated companies, it was not possible to estimate the amounts of the claims of the individual creditors of the respective companies, and therefore the Court could not act under the powers of the *Joint Stock Companies Arrangement Act*, 1870.

THIS was a Petition to obtain the sanction of the Court to a scheme for the reconstruction of the *Albert Life Assurance Company*, which was in process of liquidation, and the transfer of its goodwill and business to a new company. The Petition was heard before the Lord Justice *James* in the first instance, by his special permission.

The *Albert Company* had since its establishment taken the businesses, either directly or indirectly, of several other life assurance companies. Those whose businesses it had directly taken were seven in number—namely, the *Western*, the *Bank of London*, the *Family Endowment*, and the *Medical Invalid Companies*, which were also in liquidation, and the *National Guardian*, the *Times*, and the *Beacon Companies*, which were not in liquidation. The first four companies had taken over the businesses of other companies, and had in so doing given them indemnities against their pending contracts. The *National Guardian*, *Times*, and *Beacon Companies* had never purchased the business of any other company. The *Albert Company* had indemnified all the seven above-named companies against their pending contracts. The *Albert Company* also took over the insurance liabilities of some mutual insurance companies, but their liabilities, so far as they were subsisting, were simple liabilities of the *Albert Company*.

The scheme of reconstruction was based upon the principle that the liability of the *Albert Company* to satisfy its creditors ought to be borne primarily by the *Albert* shareholders, and, as to the contracts on which the amalgamated companies were liable, secondarily by those companies respectively. It was also admitted that all the amalgamated companies had a right to be indemnified altogether by the *Albert*. It was therefore proposed that the liability of the *Albert* shareholders should be first exhausted, and that they should also pay an extra contribution; and then, that the shareholders of the seven amalgamated companies should subscribe enough nearly to meet the deficiency, and that, in consideration of the advantage of the proposed security, the policy-holders

should consent to a reduction of £5 per cent. on the amount of their policies.

A committee had been formed of shareholders and policy-holders in the *Albert Company* and the four amalgamated companies then in liquidation—namely, the *Western, Bank of London, Family Endowment,* and *Medical and Invalid Companies*—for carrying this scheme into effect; and a new company, called the *Albert Reconstruction Life Assurance Company,* had been established for the purpose of taking up the contracts of the *Albert Company,* and carrying on a new life assurance business.

On the 16th of July, 1870, an agreement was executed by the committee and by the new company, subject to the sanction of the Court, whereby it was agreed that the business of the *Albert Company* should be sold to the new company, and that the assets of the *Albert Company,* and also the contributions of the *Albert* and the amalgamated companies, when called up, should be paid over to trustees for the new company to be applied in the payment of all policies on their maturity, subject to the reduction of £5 per cent., and of all annuities and other claims on the *Albert* and amalgamated companies in full.

The plan had received the assent of a large majority of the creditors and shareholders in the *Albert Company.*

The Petitioners were the committee and the new company; and they prayed that the agreement of the 16th of July, 1870, might be sanctioned by the Court, so as to bind all the shareholders and creditors of the *Albert* and the other companies which had been amalgamated with it, and that the liquidators of the companies which were being wound up might be ordered to carry out the agreement. The Petition was served on the liquidators of the several companies, and on the trustees of a special trust fund of the *Medical Invalid Company.*

The Petition came on before the Lord Justice *James* on the 1st of August, 1870, when his Lordship expressed his opinion that meetings ought to be held of the policy-holders of each of the amalgamated companies in liquidation separately, in order to ascertain their opinion of the scheme, and the Petition stood over for that purpose.

Meetings were accordingly called by the liquidators of the policy-

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holders of the *Western, Bank of London, Family Endowment,* and *Medical Invalid, Companies,* at each of which a majority, in number representing more than three-fourths in value of the creditors present, voted in support of the scheme. The Petition now came on again before the Lord Justice.

Sir *Roundell Palmer,* Q.C., Mr. *Fry,* Q.C., and Mr. *Waller,* for the Petitioners:—

The scheme is for the benefit of all parties. The annuity creditors will be paid in full, and the policy-holders with only a small deduction; and the contributories will be freed from expensive and continued litigation on reasonable terms. It is assented to by a large majority of the creditors of the *Albert Company* and of the amalgamated companies, and is almost unanimously approved of by the contributories.

The Court has jurisdiction to sanction such a scheme, and to bind the non-assenting creditors, and has repeatedly exercised its power under the 159th and 160th sections of the *Companies Act,* 1862: *In re Agra and Masterman's Bank* (1); *Bank of Hindustan, China, and Japan* v. *Eastern Financial Association* (2); *In re Commercial Bank Corporation of India* (3). In the last-mentioned case questions of novation arose, as in the present case, and in all the cases one object of the arrangement was to compromise conflicting and unascertained claims. The *Joint Stock Companies Arrangement Act,* 1870 (33 & 34 Vict. c. 104), removes all doubt as to the power of the Court to bind non-assenting creditors after the consent of the requisite majority has been obtained at a general meeting, which has been done in this case. The Court has also jurisdiction to sanction the scheme under the 95th section of the *Companies Act,* 1862, which gives power to the official liquidator, with the sanction of the Court, to sell the assets of the company to any person or company: *In re Agra and Masterman's Bank.*

Mr. *Willcock,* Q.C., Mr. *Amphlett,* Q.C., Mr. *Hardy,* Q.C., Mr. *Little,* Q.C., Mr. *Eddis,* Q.C., Mr. *Wickens,* Mr. *Cracknall,* Mr. *Rodwell,* Mr. *Lindley,* Mr. *Higgins,* Mr. *Jackson,* Mr. *Everitt,* Mr.

(1) 15 W. R. 554.

(2) Law Rep. 2 P. C. 489.

(3) Law Rep. 8 Eq. 241.

Freeman, Mr. *Vincent*, Mr. *Warmington*, and Mr. *Lewers*, appeared for the liquidators of the companies which were being wound up, and for various bodies of policy-holders and other persons interested, but were not called on.

SIR W. M. JAMES, L.J. :—

It is with great regret that I have arrived at the conclusion that it would be a great stretch of the jurisdiction of this Court if I were to attempt to give effect to this arrangement, however ingenious or able it may be. I have not heard any objections to it, but on the face of it it appears to me a laudable endeavour to get all these companies out of the difficulties in which they are placed. But I do not think that the Acts of Parliament enable the Court to deal with it in the manner proposed.

First of all, it is to be borne in mind that, although these companies are being wound up in the same chambers and with the same liquidators, every one of them is a distinct company, and has a distinct winding-up, and the creditors of the absorbed company have really nothing whatever to do with the absorbing company. Those who are the creditors of the *Albert* are not the creditors of the *Bank of London*, and those who are the creditors of the *Bank of London* are not the creditors of the *Albert ;* the novation, when it has taken place, has completely substituted the one for the other. With reference to the 95th section of the *Companies Act*, 1862, and the case of the *Agra and Masterman's Bank* (1), it seems to be impossible to contend that, in the case of one of the absorbed companies—for instance, the *Bank of London*—this is an arrangement for the sale of the assets of that company. I cannot doubt that if voluntary liquidators were to enter into such an arrangement under a voluntary winding-up, and proposed to effect it under the character of a sale, the Court would interfere by injunction to prevent it, and it would not be right for the Court to set an example of doing that which, if done by some person out of Court, would be treated as a mere sham. There is nothing, to my mind, at all like a transfer of the assets of any one of the absorbed companies to a new person or a new company.

Then how does the case stand under the other sections of the

(1) 15 W. R. 554.

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Companies Act, 1862? The 159th and 160th sections seem to me to provide that a company by its official liquidators, with the sanction of the Court, is to have exactly the same power of compromising both with its creditors and its debtors as an individual would have. It has the power of saying to any class of creditors, "If you will take so much less than your claim, we will pay you that without raising any question." And it has a right to say to the contributories who are the companies' debtors as to unpaid calls, "Pay us so much of your debt, and we will put an end to all questions between us." But that is a compromise, in the one case, between the company and its creditors who choose to accept it, and in the other between the company and its debtors who choose to accept it. There is nothing in the Act which enables one creditor to bind another creditor to accept a compromise, or which enables one debtor to bind another debtor with respect to paying a composition. And that was the difficulty which was felt when the Act of last session, the *Joint Stock Companies Arrangement Act*, 1870, was passed, which I cannot help thinking was passed with a view to this and other companies which were being wound up. That Act says that there shall be a power in the majority to bind the minority. But that majority must be a majority of creditors of each company which is compromising, and in order to enable the majority to bind the minority the Court must be satisfied that there is a meeting of creditors the amount of whose debts can be estimated, and that there are three-fourths of the creditors who have assented, before it will interfere to enforce that which the large majority think the most beneficial way for them to get their claims satisfied—merely applying to a winding-up in this Court the same principles as are applied in Bankruptcy to dealings between a bankrupt and his creditors. But here the Court really has no data by which it can be at all ascertained what the claims of the creditors are.

First of all, the policy does not necessarily indicate the amount of debt. A policy for £1000 on the life of one person may be a very different thing from a policy for £1000 on the life of another person; and in the case of one of the absorbed companies, a policy which has been subject to a novation has ceased to be any debt at all of that company, and has become to all intents and purposes a debt of the *Albert*. Then as to the holders of participating policies,

if there are any which have not been subject to novation according to my decision when Vice-Chancellor, their claim upon the same amount of policy would be something very different in point of amount from the claims of the holder of a non-participating policy.

That being so, I cannot apply the Act of last session to this case, so as to enable me to say that there is a statutory majority which enables me to bind the minority. In truth, it is a difficulty so vast, from the number of these companies, and the circumstances applying to them, and the different rights and positions of different classes of creditors, that I can see no way of extricating them from the ruinous process of liquidation in this Court, except an application to Parliament; and I sincerely hope that Parliament will find some means of accomplishing that object.

The Petition will be dismissed without costs; the official liquidator of the *Albert Company* will have his costs out of the estate; and the official liquidators of the other companies will have their costs out of their respective estates. With respect to the policy-holders who have appeared, I think they might have left the matter in the hands of the official liquidators, and they must pay their own costs. It is the practice of the Court in cases of winding-up, to diminish the costs of appearances as much as possible.

Solicitors for the Petitioners: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the various Respondents: Messrs. *Lawrance, Plews, & Co.*; Mr. *Manning*; Mr. *Kendall*; Messrs. *Paine & Layton*; Messrs. *Lewis, Munns, & Co.*; Messrs. *Richardson & Sadler*; Messrs. *Smith, Son, & Harvie*; Messrs. *Deane & Chubb*; Mr. *Rowland Miller*; Messrs. *Vallance & Vallance*; Messrs. *Mercer & Mercer*; Messrs. *Tilleard & Co.*; Mr. *A. Beddall*; and Mr. *W. H. Herbert.*

L. J. J.
1871
March 6.

In re BARNED'S BANKING COMPANY.

LEECH'S CLAIM.

Winding-up—Proof by Creditor holding Security—Set-off against Dividends—Letter of Credit—Bill of Exchange.

The *B. Banking Company*, at the request of *L.*, gave to *H.*, who had been instructed to buy cotton for him, a letter of credit authorizing him to draw upon them, the bills of exchange to be accompanied by bills of lading of the cotton to be delivered to them on their accepting the bills. A bill for £7798 was accordingly drawn and accepted by the banking company, and the bills of lading delivered to them. The banking company handed the bills of lading to *L.*, to enable him to obtain an advance. *L.* obtained an advance of £6000 on them from his brokers, and paid the amount into the banking company, who carried it to his account. Before the bill of exchange arrived at maturity, the banking company was ordered to be wound up. After the commencement of the winding-up, but before any claim was sent in upon the bill, the cotton was sold by the brokers, who, after retaining £6000, paid the balance of £574 to the holders of the bill.

The Master of the Rolls allowed the holders to prove for the whole amount of the bill, but directed the £574 to be set off against the dividends payable to them:—

Held (reversing the decision of the Master of the Rolls), that the £574 could not be set off against the dividends.

But, *semble*, the amount of the proof ought to have been reduced by £574.

THIS was an appeal from an order of the Master of the Rolls made in the winding up of *Barned's Banking Company, Limited.*

The facts were as follows: In November, 1865, the banking company, at the request of Mr. *H. Lafone*, of *Liverpool*, issued a letter of credit, dated the 30th of November, 1865, to Messrs. *William Hunter & Co.* of *New Orleans*, in the following terms:—

"At the request and on account of *H. Lafone*, Esq., of this town, we have this day issued a credit in your favour for £20,000, and you are therefore authorized to value on this company in such sum or sums as may be convenient to you, not exceeding in the whole the sum of £20,000, at sixty days, against cotton purchased in conformity with Mr. *Lafone's* letter of instructions under this date. Such drafts to be sent regularly to us, and to be accompanied by the corresponding bills of lading for cotton. And we engage to accept such bills, if in the hands of a *bonâ fide* holder, on the said bills of lading being given up to us, making them payable

at Messrs. *Prescott, Grote, & Co.*, bankers, *London*, and to pay them at maturity."

In pursuance of this letter of credit, *W. Hunter & Co.* drew on *Barned's Banking Company* a bill of exchange for £7798 18*s.* 7*d.*, in the following form:—

"1st of March, 1866.

"Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of ourselves in *London* £7798 18*s.* 7*d.* sterling, value received, and charge the same to account of credit No. 14, dated 30th of November, 1865, against 242 bales of cotton, per *Gambia*.

"*W. Hunter & Co.*

"To *Barned's Banking Company, Limited.*"

The *National Bank of Orleans* discounted this bill, and sent it, with bills of lading for 242 bales of cotton attached, to the *Bank of Liverpool*, their agents in *England*. The *Bank of Liverpool* presented the bill for acceptance on the 20th of March, 1866, and the same was duly accepted by *Barned's Banking Company*, who thereupon received the bills of lading.

On the 3rd of April, 1866, *Barned's Banking Company* handed the bills of lading to *H. Lafone*, who obtained an advance of £6000 upon them from Messrs. *Colin Campbell & Co.*, and the money was paid to *Barned's Banking Company*, and carried by them to a special account, called "*H. Lafone*, Cotton Account." They gave notice of this to *W. Hunter & Co.*, and informed them that they held the money "as against the company's acceptance for £7798 18*s.* 7*d.*" *Barned's Banking Company* stopped payment on the 18th of April, 1866, before the bill came to maturity, at which time the sum of £6000 was still standing to the credit of *H. Lafone* to the same account. The company was ordered to be wound up on the 27th of April, 1866. After the commencement of the winding-up, but before any claim had been sent in upon the bill, the cotton was sold by *Colin Campbell & Co.*, who repaid themselves out of the proceeds the sum of £6000, and paid the balance, amounting to £574 17*s.* 6*d.*, into the *Liverpool Bank* to the account of the holders of the bill.

Messrs. *Leech, Harrison, & Co.*, to whom the bill had been indorsed for collection, claimed, in the first place, to have the

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£6000 standing to the account of *H. Lafone* applied towards payment of the bill of exchange, and their proof admitted for the balance; and in case the sum of £6000 was not so applicable, to be allowed to prove for the whole amount of the bill.

The case came before the Master of the Rolls on an adjourned summons on the 7th of July, 1870, when his Lordship decided that the credit of £6000 was not appropriated to the payment of this particular bill, but that the holders of the bill were entitled to prove for the whole amount of the bill.

On the 29th of July the claimants made a second application to the Master of the Rolls, asking that the order might be amended by reducing their claim by the amount of £574 17*s.* 6*d.*, which they had received on account of the bill; but his Lordship adhered to the terms of the previous order, and refused the application with costs.

On the 20th of January, 1871, the Master of the Rolls made a further order upon an adjourned summons, that the official liquidators should pay to Messrs. *Leech & Co.* a dividend of 5*s.* in the pound on the sum of £7798 18*s.* 7*d.* certified to be due upon the bill of exchange, after deducting £574 17*s.* 6*d.* from the said dividend, and that Messrs. *Leech & Co.* should pay the costs of the adjourned summons. From this order Messrs. *Leech & Co.* appealed, asking that it might be varied by striking out the words "deducting £574 17*s.* 6*d.* from the said dividend."

Mr. *Jessel*, Q.C., and Mr. *Fischer*, for the Appellants:—

We were willing to concede that the proof should be reduced by the sum received from the sale of the cotton, but the official liquidator refused that offer, and the Master of the Rolls has decided that the sum shall be deducted from the dividend. That is contrary to all precedent, and would only be right if the proceeds of the cotton had been assets of the bank or money received by us to their use. That was not the case here, for the cotton belonged to *Lafone*, and the proceeds, after satisfying the lien for £6000, was paid by his authority to us.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

The cotton was remitted to the banking company to meet the bill, and the money produced by the sale was subject to their lien.

The bills of lading were placed in *Colin Campbell & Co.'s* hands by common arrangement. The proceeds were assets of the banking company, and ought therefore to be set off against the dividends payable to the holders: *Coupland's Claim* (1).

The LORD JUSTICE JAMES:—Will the Appellants consent to the order being varied by reducing the amount of the proof by the sum in dispute?

Mr. *Fischer*:—The question is capable of argument upon the authority of *Kellock's Case* (2), but we will consent to the reduction, if we are allowed the costs of the application of the 29th of July, 1870, which were refused us by the Master of the Rolls.

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the order, as it stands, cannot be sustained. There is a proof standing for a particular sum of money, the amount of the bill in question. The order is that the Appellants should receive dividends on the proof, setting off against it a sum of £574 17*s.* 6*d.* which they have received. That sum cannot be, in my judgment, properly set off against the dividend, unless it be either at law or in equity a debt which was due from the holders of the bill, the persons entitled to the proof, to *Barned's Banking Company*. If it were really a debt due from them to the bank, or part of the assets of the bank which they had received improperly, then it would be a proper case of set-off. But I cannot arrive at the conclusion that any such case has been proved. The persons who seek to establish a set-off have the *onus probandi* upon them to shew that at some period in the course of this transaction the bank could have brought an action for money had and received, or filed a bill in this Court to recover in specie the £574 17*s.* 6*d.*, the bill being unpaid in respect of which the cotton was given as security. The circumstances under which the £574 17*s.* 6*d.* was paid are these: There were certain goods given to *Barned's Banking Company* as a security for this particular bill of exchange in their hands, and Mr. *Lafone*, being the person who was the principal and the owner of the cotton, receives from them, under circumstances the whole of which are not disclosed to us,

(1) Law Rep. 5 Ch. 167. (2) Law Rep. 3 Ch. 769.

L. J. J. 1871 — *In re* BARNED'S BANKING COMPANY. — LEECH'S CLAIM.

the bills of lading. He was apparently in possession of the bills of lading of his own cotton, with the assent of the persons who had a security on that cotton. It is said, and it appears to me that it is the probable explanation of the case, that having received £6000 by way of mortgage, and having paid that £6000 into *Barned's Bank* to meet this specific bill—which should have been kept there for the purpose of meeting this bill—he was the owner of the bills of lading, and at liberty to make any arrangement he thought fit with *Colin Campbell & Co.*, the brokers. *Colin Campbell & Co.*, by *Lafone's* order, paid the balance beyond the £6000 to the *Bank of Liverpool*, to the credit of the owners of the bills. It appears to me, subject to any question which may be raised as to the application of *Kellock's Case* (1), that the £574 17*s.* 6*d.*, being part of the proceeds of the cotton specifically pledged to this bill, ought to have been, and now ought to be, applied in reduction of the bill; but that the persons who received it, and who are the holders of the bill, ever received it as money had and received for *Barned's Banking Company*, or that *Barned's Banking Company* ever had a right to receive it from them without discharging the bill, I cannot conceive. It appears to me that the only legal or equitable right would have been to have had that sum, part of the proceeds of the cotton, applied in reduction of the bill. To say otherwise would be to say that an acceptor who has failed to meet his acceptance has a right specifically to the proceeds of the thing put in his hands simply for the purpose of security for the due payment of the acceptance. As at present advised, it appears to me that, on the authority of *Coupland's Claim* (2), the proof ought to have been reduced by the amount of the sum received, and I will give leave to the official liquidator to apply to the Court to have it so reduced, but I cannot compel the Appellants to submit to any such order now. They are entitled to have that part of the order discharged which gives the right of set-off in respect of the sum of £574 17*s.* 6*d.*; and they are entitled to the costs in the Court below, but there will be no costs of this appeal.

Solicitors for the Appellants: Messrs. *Chester & Urquhart.*
Solicitors for the Official Liquidator: Messrs. *Freshfield.*

(1) Law Rep. 3 Ch. 769. (2) Law Rep. 5 Ch. 167.

In re NATIONAL PROVINCIAL LIFE ASSURANCE SOCIETY.

FLEMING'S CASE.

L. JJ.
1871
Jan. 31;
March 20

Amalgamation of Companies—Life Assurance Company—Transfer of Business—Novation of Contract—Creditor a Shareholder in the new Company.

The *N. Fire Assurance Company* and the *N. Life Assurance Company* were amalgamated with the *B. Assurance Company;* and a deed of settlement was executed by which the *B. Company* was constituted as a common law partnership. The deed recited the agreement by which the businesses of the *N. Fire* and *N. Life Companies* were transferred to the *B. Company*, and the *B. Company* undertook to indemnify them against all liabilities.

F. was a policy-holder in the *N. Life Company*, and was also a shareholder in the *N. Fire Company*, and as such shareholder executed the deed of settlement of the *B. Company*, and received shares in the *B. Company* in exchange for his shares in the *N. Fire Company*.

The *B. Company* and the *N. Life Company* were afterwards ordered to be wound up, and *F.* claimed to prove as a creditor against the estate of the *N. Life Company*:—

Held, that *F.*, having executed the deed of settlement of the *B. Company*, had accepted the liability of that company, and could not claim as a creditor against the *N. Life Company*.

The decision of *Bacon*, V.C., affirmed, on additional evidence.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, rejecting the claim of *William Fleming* to rank as a creditor of the *National Provincial Life Assurance Society* in respect of a policy held by him.

The *Society* was incorporated under the 7 & 8 Vict. c. 110, and was registered on the 18th of July, 1851. In August, 1856, the *Society* transferred its business and assets to the *Bank of London and National Provincial Life Assurance Association*, which was provisionally, but never completely, registered as a joint stock company; and from that time the *Society* ceased to carry on business. At the same time the business of another company, called the *National Provincial Fire Assurance Company*, was also transferred to the *Association*.

In October, 1858, the *Association* transferred its business and assets to the *Albert Life Assurance Company*, the *Albert* taking upon itself the liabilities of the *Association*, and from that time the *Association* ceased to carry on business.

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The policy upon which *Fleming* claimed to be a creditor of the *National Provincial Life Assurance Society*, was effected on the 6th of October, 1855, by *C. G. Carrol*, upon his own life, for £1000, on the terms of participation in profits, the premium being payable half-yearly to the directors of the *Society* for the time being, at the office of the *Society*, with the usual proviso that the capital, stock, funds, and corporate property of the *Society* should alone be charged and liable under it, and that the shareholders should not be personally liable.

It appeared from the evidence before the Vice-Chancellor that *Fleming* knew, though it did not appear that he received formal notice, of the successive transfers from the *Society* to the *Bank of London*, and from the *Bank of London* to the *Albert*. He, however, never accepted any policy of the *Bank of London* or of the *Albert* in substitution for the policy effected with the *Society*, and no memorandum was ever indorsed upon the policy substituting for the liability of the *Society* that of the *Bank of London* or of the *Albert;* but he paid the premiums to the *Bank of London* in 1857 and 1858, and to the *Albert* from 1858 until the death of *Carroll*, in June, 1869. Upon the death of *Carroll*, *Fleming* sent in his claim on the policy to the *Albert Company*. On the 15th of July, 1869, the secretary of the *Albert* wrote, stating that the company admitted the claim (subject to a reduction of the amount in consequence of a misstatement of his age by *Carroll* when the policy was effected), and that the money would be payable on the 11th of October. The money, however, was never paid, and the *Albert* was ordered to be wound up on the 17th of September, 1869; and similar orders were also made with respect to the *National Provincial Society* and the *Bank of London*.

The Vice-Chancellor was of opinion that the conduct of *Fleming* in paying the premiums to the *Albert Company*, and in making his claim against that company when the policy became payable, were conclusive evidence that he had adopted that company as his debtor instead of the *National Provincial Society*, and accordingly refused his claim. From this decision *Fleming* appealed.

Before the hearing of the appeal before the Lords Justices was concluded, the official liquidator applied for, and obtained, leave to produce evidence to shew that Mr. *Fleming* was a shareholder in

both the *Bank of London* and *Albert Companies*. The case was re-argued upon the fresh evidence, and as the decision of the Court entirely turned upon that evidence, it is unnecessary to report the arguments upon the case as it was originally presented to the Vice-Chancellor and to the Lords Justices. The result of the fresh evidence was as follows:—

Mr. *Fleming* was a holder of stock in the *National Provincial Fire Assurance Company*, and on the 1st of October, 1856, became the holder of twenty-five shares in the *Bank of London and National Provincial Assurance Association*, in exchange for his stock in the *National Provincial Fire Assurance Company*, and received two several dividends from the *Association*.

In the capacity of shareholder he executed the deed of settlement of the *Bank of London and National Provincial Assurance Association* of the 21st of August, 1856. That settlement recited, among other things, the agreements which had been entered into by the *National Provincial Life Assurance Society* and by the *National Provincial Fire Assurance Company* for the transfer of their respective businesses to the *Bank of London and National Provincial Assurance Association*, and empowered the directors to carry those agreements into effect.

On the amalgamation of the *Bank of London and National Provincial Assurance Association* with the *Albert Life Assurance Company*, Mr. *Fleming* received eight shares in the last-mentioned company in exchange for his twenty-five shares in the *Association*, and he received several dividends on the new shares.

Mr. *Fry*, Q.C, and Mr. *Wickens*, for Mr. *Fleming*.

Mr. *Willcock*, Q.C., and Mr. *Cottrell*, for the official liquidator, relied upon the fresh evidence as shewing that Mr. *Fleming* was bound by the contract between the *National Provincial Life Assurance Society* and the *Bank of London Association*.

Mr. *Fry*, in reply:—

Mr. *Fleming* was not a shareholder in the *National Provincial Life Society*, in which the policy was taken out, but in the *National Provincial Fire Company*, which was quite distinct, and the fact that they were both amalgamated at the same time, and that the

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agreement is recited in the deed of settlement of the *Bank of London Association* does not bind him to the terms of the agreement with the *Life Assurance Society*, with which he had nothing to do except as a creditor.

The recital of the agreements with the two companies is very vague, and gave no notice of their contents. Joint stock companies are different from ordinary partnerships, inasmuch as the mutual agency of the partners is of a limited character: *Baird's Case* (1); *In re Professional Life Assurance Company* (2).

SIR W. M. JAMES, L.J.:—

This case appears to me to present less difficulty than any of the other cases of novation which have been before us, if, indeed, it can be said to have anything to do with novation.

The case resolves itself into this: The creditor of a joint stock company becomes a member of a new partnership, which takes all the assets of the old partnership or company, with an undertaking express or implied, to discharge all the debts of that company, including his. It seems to me impossible to hold under those circumstances that the old debt subsists as between that shareholder and the old company. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Mackenzie, Trinder, & Co.*
Solicitors for the Official Liquidator: Messrs. *Deane & Chubb.*

(1) Law Rep. 5 Ch. 725. (2) Law Rep. 3 Ch. 167.

Ex parte WHITE. *In re* NEVILL.

L. JJ.
1870
Nov. 18, 19; Dec. 17.
1871
Jan. 14, 21; Feb. 18.

Agency—Consignee—Sale or Return.

T. & Co. were in the habit of sending goods for sale to *N.*, who was a partner in the firm of *N. & Co.*, but received these goods on his private account. The course of dealing between *T. & Co.* and *N.* was that the goods were accompanied by a price list. *N.* sold the goods on what terms he pleased, and each month sent to *T. & Co.* an account of the goods he had sold, debiting himself with the prices named for them in the price list, and at the expiration of another month he paid the amount in cash without any regard to the prices at which he had sold the goods, or the length of credit he had given. He paid the moneys which he received from the sales into the general account of his firm, and made his payments to *T. & Co.* through his firm, with whom he kept an account of moneys paid in and drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of *T. & Co.* *N. & Co.* having executed a deed of arrangement with their creditors, *T. & Co.* sought to prove against the joint estate for the amount standing to *N.*'s credit with his firm, on the ground that the same arose from moneys belonging to *T. & Co.*, and improperly placed by *N.* in the hands of his firm:—

Held (reversing the decision of the Chief Judge), that such proof could not be admitted, for that the course of dealing shewed that although both parties might look upon the business as an agency, *N.* did not, in fact, sell the goods as agent of *T. & Co.*, but on his own account, upon the terms of his paying *T. & Co.* for them at a fixed rate if he sold them, and the moneys he received for them were therefore his own moneys, which *T. & Co.* had no right to follow.

THIS was an appeal by the trustees under a deed of arrangement with creditors executed by *Nevill, Jourdain, & Co.*, from a decision of the Chief Judge admitting a proof by Messrs. *Towle & Co.* for £2035 1*s.* 2*d.*, against the joint estate. The firm of *Nevill & Co.* consisted of *Alfred Nevill, Wm. Edward Jourdain,* and *Albert Jourdain,* who carried on business as wholesale hosiers and shirt manufacturers, and on the 19th of May, 1868, executed the above-mentioned deed of arrangement.

Towle & Co. were cotton manufacturers, and for some years they had been in the habit of sending goods of their manufacture to *Alfred Nevill* for sale. The terms did not appear from any written agreement, but could only be inferred from the course of dealing, the nature of which the Court collected from the evidence to

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have been as follows:—The goods were consigned by *Towle & Co.* to *Alfred Nevill*, accompanied by a price list, and he sent them monthly an account of the goods which he had sold, debiting himself with the price given in the price list, not specifying the particular contracts, nor giving the names of the purchasers, nor the price at which, nor the terms on which, he had sold; and in the next month he paid to *Towle & Co.* the moneys which were due to them in respect of the sales thus accounted for. He frequently had the goods bleached or dyed before he sold them, but gave no account to *Towle & Co.* of the expense. In the above transactions with *Towle & Co.*, *Alfred Nevill* acted on his own behalf, and not as a member of his firm; but, by an arrangement between himself and his partners, the moneys which he received from the purchasers of the goods sent him by *Towle & Co.* were paid to the credit of the firm with their bankers to their general account. *Nevill*, in fact, employed his firm as his bankers, and he had an account in the books of the firm containing entries of all sums paid in and drawn out by him in respect of moneys not relating to the partnership, many of them not being at all connected with the goods of *Towle & Co.* *Nevill* made his payments to *Towle & Co.* partly by remitting to them bills given to him by the persons to whom he had sold the goods, and partly by cheques. When bills were thus remitted, discount on them was charged against *Nevill*. The cheques which he sent were cheques drawn by *Nevill & Co.* on their bankers, and never cheques drawn by *Nevill* on his own account. At the time of the stoppage of *Nevill & Co.* there was a balance standing to the credit of *Alfred Nevill* on his account in the books of his firm, and for that balance *Towle & Co.* sought to prove, alleging that it was trust-money of theirs which had been improperly paid by *A. Nevill* to his firm with knowledge of the trust. The Chief Judge admitted the proof, and the trustees appealed. That the balance in *Nevill's* favour arose mainly from *Towle & Co.'s* goods was not disputed; but questions as to appropriation of payments were argued at considerable length, which, in the view the Court took of the case, it became unnecessary to decide.

Mr. Serjeant *Sargood*, and Mr. *Reed*, for the Appellants.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for *Towle & Co.*

Benjamin v. *Porteus* (1) was the only authority referred to on that part of the case on which the Court gave judgment.

SIR W. M. JAMES, L.J. :—

This case, owing to various accidents, has occupied a great length of time, which has enabled us fully to consider it, and we can therefore dispose of it without further delay.

The question is, whether the moneys for which it is sought to prove were trust moneys belonging to the claimants, and were improperly placed by *Nevill* in the hands of *Nevill, Jourdain, & Co.*, so as make the firm debtors to the claimants, on the ground that whoever knowingly receives trust moneys from a trustee in breach of his trust is himself liable for them immediately and personally to the persons whose trust moneys have been so dealt with.

Now, whether these were trust moneys or not depends upon the relationship that existed between Messrs. *Towle & Co.* and Mr. *Nevill.* The business which *Nevill* carried on with the goods of *Towle & Co.* has been called a cotton agency business, and the word "agency" in its *primâ facie* sense seems to imply the relation of principal and agent, and not of vendor and purchaser; but it has been admitted in the course of the argument that there is no magic in the word "agency." It is often used in commercial matters where the real relationship is that of vendor and purchaser; and the question is, whether the dealings between Mr. *Nevill* and Messrs. *Towle & Co.* with reference to these goods resulted in the relationship of vendor and purchaser, or in the relationship of principal and agent.

We have no written document shewing the relationship between the parties, or stating the terms on which the business was to be carried on between them; but we have a course of dealing extending over a number of years, and such a lengthened course of dealing is often the most satisfactory mode of shewing the intention of the parties, and what their relations were.

It is clear from the course of dealing that the bargain was substantially this: Mr. *Nevill* was to dispose of the goods sent to him by *Towle & Co.*, and was not to pay for them unless he disposed of them, and he was to return, at the end of every month, an account

(1) 2 H. Bl. 590.

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of sales that he had actually made; and then, after the lapse of another month, he was to pay in cash for the amount of the goods which he had so disposed of, according to their values as fixed by a price list sent to him. It does not appear that he ever was expected to return any particular contract, or the names of the persons with whom he had dealt. He pursued his own course in dealing with the goods, and frequently before sale he manipulated them to a very considerable extent by pressing, dyeing, and otherwise altering their character, changing them as much as wheat would be changed by being turned into flour; and he sold them on what terms he pleased as to price and length of credit. No question appears ever to have been raised as to whether he was entitled to do this; and we must take it that he did not commit any breach of duty in so doing. That is quite inconsistent with the notion that he was acting in a fiduciary character in respect of those goods. If he was entitled to alter them, to manipulate them, to sell them at any price that he thought fit after they had been so manipulated, and was still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he had sold them, or to anything else than the fact of his having sold them in a certain month, it seems to me impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of vendor and purchaser existed between *Towle & Co.* and the different persons to whom he sold the goods. The case seems very analogous to one suggested by Mr. *De Gex* in the course of the argument. If a publisher publishes for an author, and sells for the author, and holds all the copies of the book, and at some specified time has to return to the author an account of all those sold, and pay for them at a price fixed between the author and the publisher, the publisher being at liberty to make his own bargain with retail booksellers all over the country, it could never be supposed that the relation of creditor and debtor or vendor and purchaser ever existed between the author and the retail booksellers. I have not the slightest doubt that a great quantity of business called "agency business" is carried on in the same way in the country, and that there are large dealers who have agents in all the towns of *Great Britain* and *Ireland*. Possibly they may say: "We will give you the goods; you shall

be the sole person whom we supply in a particular district, and we shall not call upon you to pay until you have disposed of them. You are at liberty to sell upon your own terms; we have nothing to do with the persons with whom you deal, but we look to you to pay at our trade prices for the goods you sell. You must return the sales that you have made up to certain times; we will give you a certain credit, but when that is expired, we look to you to pay us the cash." That is a very reasonable bargain, and it is the kind of bargain which, in my opinion, the course of dealing shews to have existed in this case; and if so, how is it possible to say that the proceeds of the sales were trust-moneys in the hands of Mr. *Nevill?* Mr. *Nevill* was not to pay immediately; and if he sold for cash, it seems to me impossible that *Towle & Co.* could have any right to say, "You have sold the goods for cash, therefore hand over the moneys to us at once." *Nevill* would have said, "No; the bargain between us is that I am to give you an account at the end of the month, and to pay you at the end of another month. My selling for hard cash does not alter the nature of the bargain between you and me, or entitle you to call upon me to hand the moneys over to you, or to put the moneys *in medio* and keep them for you." The proceeds of sale were his own moneys, and not trust moneys, and he was at liberty to deposit them with a banker, or deal with them as he pleased.

He then, being in this position, makes a bargain with his partners by which they are to be in truth his bankers—a bargain that he was to pay into the account of the firm all moneys he received in respect of these goods, and make through the firm all his payments in respect of them. Now, if he was entitled to use these moneys during the two months' credit, it seems to me impossible to say that there was any breach of trust, or that his partners were allying themselves to any breach of trust in making a bargain that they were to be his bankers in respect of this business. Now, *Nevill's* course of dealing must have been brought to the notice of *Towle & Co.*, if they ever paid the slightest attention to the matter; for it seems that they were paid partly by bills of the customers—on which *Towle & Co.*, when they took them, charged discount, thus shewing that *Towle & Co.* had nothing to do with the terms of the bargains between *Nevill* and the purchasers—and partly by

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cheques drawn in the name of the firm of *Nevill & Co.* upon *Nevill & Co.'s* bankers. There does not appear to have been a single case in which Mr. *Nevill* paid by cheque of his own upon any banker of his own. This gave *Towle & Co.* complete notice of *Nevill's* mode of dealing, and therefore it is impossible for them to say that what he did in this respect was a breach of trust. It appears to me, therefore, to be the necessary conclusion that, as regards these transactions, Mr. *Nevill* was in the position of a person having goods "on sale or return." That being so, the foundation of the whole claim of *Towle & Co.* has failed, for there never were trust moneys of *Towle & Co.* improperly put into the hands of *Nevill & Co.* The case would have stood very differently if, as was at first supposed, *Nevill & Co.* had kept a distinct account headed and ear-marked as an account of *Towle & Co.*, or as an account of the cotton agency. If that had been so, *Towle & Co.* might have said: "Although it is apparently *Nevill's* account, it really is our account, and we are entitled to prove as *cestuis que trusts*, although the trustee himself could not have proved, being a member of the firm." But on looking into the account, it appears that it was an account of all the drawings-out and puttings-in by *Nevill* in respect of matters not belonging to the partnership, including items to a considerable amount with which *Towle & Co.* have no connection whatever. I am of opinion, therefore, that the foundation of the case has failed, and I do not think it necessary to express any opinion as to the other points which have been discussed before us.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and on the same grounds. It appears to me that the real question is, when *Nevill* sold the goods, did he sell them as the agent of *Towle & Co.*, so as to make *Towle & Co.* the vendors, and the persons to whom he sold, purchasers from *Towle & Co.*?—or did he sell on his own account, so as to create the relation of purchaser and vendor between himself and *Towle & Co.*, and again the relation of vendor and purchaser between himself and the persons to whom he sold? Now, it is said that he was a *del credere* agent, and no doubt it requires a very minute examination of what the course of business is, to distinguish between a

del credere agent, and a person who is an agent up to a certain point, that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit and sold them again on his own account. And no doubt persons may suppose that their relationship is that of principal and agent, when in point of law it is not. It is quite clear that *Nevill*, if he sold these goods, was to pay *Towle & Co.* for them, at a fixed price—that is to say, a price fixed beforehand between him and them—and at a fixed time. Now, if it had been his duty to sell to his customers at that price, and to receive payment from them at that time, then the course of dealing would be consistent with his being merely a *del credere* agent, because I apprehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore, if he sells at the price at which he is authorised by his principal to sell, and upon the credit which he is authorised by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time—in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different from those fixed by the contract. He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a *del credere* agent; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case is making, on his own account, a contract of purchase with his

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alleged principal, and is again re-selling. But if, in addition to this, he is allowed to change the character of the goods—if he may turn wheat into flour, or grey goods into dyed or bleached goods, and sell those changed goods on any terms and at any price he pleases—that makes it still clearer that he is not selling on account of a principal, but that he is selling on his own account; for, of course, if he were selling on account of his principal, and the principal could sue upon those contracts, the principal must be liable to be sued upon them. Now, can anything be more absurd than to say that *Towle & Co.* would be liable to be sued if any portion of those goods had been badly dyed or badly bleached? And yet, if the contract for the sale of the dyed and bleached goods as goods properly dyed and bleached was made by *Nevill* on account of *Towle & Co.*, it would follow that *Towle & Co.* would be liable to be so sued. I am aware that it is said that there is no direct evidence that *Towle & Co.* were aware of his dyeing and bleaching those goods. But the course of business had gone on for years, and this change in the character of the goods had been effected, not now and then only, but with respect to very large quantities of them; and it can hardly be supposed that *Towle & Co.* did not know of it. Mr. *Towle* practically acknowledged, in his cross-examination, that the real bargain between them was simply this, that *Nevill* was to pay *Towle & Co.* a fixed price at a fixed time, but he was not bound to sell to the customer at that price or at that time, but was left at liberty to make his own bargains. Both *Towle & Co.* and Mr. *Nevill* may possibly have thought that this did not prevent their relation being the relation of principal and agent; but in my opinion, in point of law, it clearly does; and notwithstanding the strong observations that have been made by Mr. *De Gex*, I do not think that we shall be prejudicing ordinary commercial dealings by not giving to a consignor the rights of a principal as to the proceeds of goods sold by his consignee in cases where the contracts made by the consignee are not really contracts made by him as agent or on account of the consignor.

The only case cited was *Benjamin* v. *Porteus* (1). That case really turned only on the admissibility of a witness, and had not arrived at that stage at which any discussion would arise whether the action

(1) 2 H. Bl. 590.

was maintainable at all; and the witness was not a factor entrusted with goods, where you may raise the question whether there is a sale and a subsale, but he was a broker who had never had the goods in his possession, and whose business it was to make contracts in the name of his principal. I do not say that it is not possible for parties to make a bargain under which the consignee may receive in his remuneration whatever the goods fetch above a certain price, and yet sell them as agent; but the question is whether such a bargain is to be inferred in the present case. If *A.* hands over his goods to *B.*, and *B.* is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and *B.* then sells to *C.*, the natural inference from those facts is, beyond all doubt, that there is a sale made to *B.*, and another sale from *B.* to *C.*, and all the circumstances confirm the view that such was the nature of the dealing here. I am of opinion, therefore, upon the whole of this case, that the contracts made by *Nevill* were, in point of law, contracts made by him on his own account, and not contracts made by him as agent for *Towle & Co.*, and therefore that the proceeds of the sales were not *Towle & Co.'s* moneys.

Feb. 18, 1871. Mr. *De Gex* applied for leave to appeal to the House of Lords.

Mr. Serjeant *Sargood* opposed.

SIR W. M. JAMES, L.J.:—

I see no reason to doubt the soundness of the conclusion at which we arrived, but the case is one of importance to the mercantile community, and is, in my opinion, just the kind of case in which leave to appeal ought to be given.

SIR G. MELLISH, L.J., concurred.

Some discussion then took place as to the costs of the application, and their Lordships determined that they must be paid by the applicant.

Solicitors for the Appellants: Messrs. *Bannister & Robinson.*
Solicitor for Messrs. *Towle & Co.*: Mr. *G. Cheatle.*

L. JJ.
1871
Jan. 28, 30.

Ex parte O'LOGHLEN. *In re* O'LOGHLEN.

Debtor Summons—Service out of the Jurisdiction—Irish Debtor—Bankruptcy Act, 1869, *s.* 6—*General Order, January*, 1870, *Rules* 59, 61.

An Irish creditor had recovered judgment in *England* against *L.*, an Irish non-trader, whose residence was in *Ireland*, but who, being Judge Advocate-General, attended at an office in *Westminster*, and being also a Member of Parliament, spent a considerable part of his time in *London*, staying at an hotel. The creditor took out a debtor summons in the English Court of Bankruptcy, on an affidavit that *L.* was resident at the office. *L.* was at this time at his house in *Dublin*, and the creditor obtained from the Registrar an order to serve the summons in *Dublin*. It was served accordingly on the 26th of April. *L.* did not comply with it, but on the 29th of May gave notice of motion to discharge the order of service, and on the 27th of July the Registrar, acting as Chief Judge, refused the motion with costs. The creditor then petitioned for adjudication, and the Registrar, acting as Chief Judge, adjudged *L.* bankrupt. On appeal from the order of adjudication:—

Held, that the adjudication must be annulled, for that *L.* had not committed an act of bankruptcy, as, upon the true construction of the *Bankruptcy Act*, 1869, and the General Order of January, 1870, a debtor summons cannot be served out of the jurisdiction:

Held, also, that *L.* was not estopped by the order of the 27th of July from disputing the jurisdiction to order service abroad.

Per James, L.J.: *Semble*, even personal service on *L.* in *England* would have been invalid.

THIS was an appeal motion by Sir *Coleman Michael O'Loghlen* to annul an order of adjudication made by Mr. Registrar *Spring Rice*, acting for the Chief Judge in Bankruptcy.

The Appellant was Member of Parliament for *Clare* and Judge Advocate-General. His residence was at *Drumconora* in the county *Ennis*, and in *Merrion Square, Dublin*. He had an office at 35, *Great George Street, Westminster*, as Judge Advocate-General, but this was a building belonging to the Crown, and no one resided there except an office-keeper appointed by the Treasury. The Appellant, when in *London* in discharge of the duties of his office, or as Member of Parliament, lived at an hotel.

On the 1st of July, 1869, *Harris*, a money-lender in *Dublin*, recovered judgment in England against the Appellant for £108 13*s.* 1*d.*

On the 14th of April, 1870, *Harris* took out a debtor summons in the *London* Bankruptcy Court against the Appellant for the

above amount. By his affidavit, on applying for the summons, he stated that the Appellant resided within the district of the Court, and that to the best of the deponent's knowledge, information, and belief, he resided at 35, *Great George Street, Westminster.* The Appellant was then in *Dublin,* having joined his family there during the Easter recess of Parliament.

On the 20th of April *Harris* applied for leave to serve the summons in *Ireland,* in support of which application an affidavit was made by a clerk, who deposed that he had attended at 35, *Great George Street,* for the purpose of serving the summons, and had seen there a person whom he believed to be a servant of the Appellant, and that this person informed him that the Appellant was in *Dublin,* and that it was not known when he would return to *London.* The deponent went on to say, that he verily believed that the Appellant was keeping out of the way to avoid personal service of the summons. Mr. Registrar *Spring Rice* thereupon made an order for personal service on the Appellant at his house in *Merrion Square,* or elsewhere in *Ireland.* The summons was accordingly personally served on the Appellant in *Dublin* on the 26th of April.

On the 19th of May, 1870, the Appellant gave notice of motion to discharge the order of the 20th of April, and to dismiss the summons, on the ground that the Appellant had not resided or carried on business in *England.* On the 27th of July this motion was refused with costs by Mr. Registrar *Spring Rice,* acting as Chief Judge.

On the 30th of July a Petition for adjudication was presented by *Harris,* founded on non-compliance with the debtor summons, and on the 9th of November the order under appeal was made.

Mr. *Winslow,* and Mr. *Langley,* for the Appellant:—

We take three objections: 1, that there is no authority to issue a debtor summons, except against a person *bonâ fide* resident in *England;* 2, that there is no jurisdiction to serve in *Ireland* a debtor summons of the English Court of Bankruptcy: 3, that no act of bankruptcy, except as specially provided in sect. 6 of the Act of 1869, can be committed except in *England.* Here the debtor was not in *England* when served, nor for twenty-one days after. The Irish Court of Bankruptcy has exclusive jurisdiction

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in bankruptcy over Irish debtors: Bankruptcy Act, 1849, sect. 90; 20 & 21 Vict. c. 60, s. 31; *In re Rogers* (1). In the Orders of the 8th of January, 1870, Rule 61, as to service, there is not a word pointing at service abroad; nor is there any provision for giving time, which shews that service abroad was not contemplated. Sect. 78 of the Act of 1861 provides for service of a summons abroad, but the Act of 1869 does not. The Act of 1869, sect. 6, does not refer to service abroad. The bankruptcy laws do not extend out of *England*, except where it is expressly so provided. The right to proceed in bankruptcy is a special right, governed by rules intended for the benefit of all the creditors, and a single creditor has no right to transfer the bankruptcy proceedings to a country where neither the debtor nor the creditors reside: *Ex parte Williamson* (2); *In re Sanderson* (3); *In re Bianconi* (4); *Ex parte Gibson* (5).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, *contrà* :—

The creditor has recovered a judgment in the English Courts, which will be worthless if it cannot be followed up here: *Butler* v. *Ablewhite* (6). The summons is to be personally served. It has been personally served in this case. The question of service was fought out on the motion to rescind the order for service in *Ireland* and there has been no appeal. This is a waiver; in fact, it is *res judicata*. The only object of service is notice: *Davidson* v. *Marchioness of Hastings* (7). Personal service without any order would have been good. The debtor is to be considered resident in *England*, being a minister of the Crown and drawing a salary here. The debt is an English debt; there are creditors here; there is not a particle of property in *Ireland;* but here there is a salary which could be made available in an English bankruptcy. It never was necessary for a man to be resident here in order to be made bankrupt here: *Williams* v. *Nunn* (8).

[The LORD JUSTICE MELLISH:—But does the Act authorize service out of the jurisdiction?]

(1) 9 Ir. Ch. Rep. 150.
(2) 1 Atk. 82.
(3) 11 Ir. Ch. Rep. 421.
(4) 9 L. T. (N.S.) 847.
(5) 12 L. T. (N.S.) 101; 11 Jur. (N.S.) 273.
(6) 6 C. B. (N.S.) 740.
(7) 2 Keen, 509.
(8) 1 Taunt. 270.

It directs personal service, and does not say that it must not be out of the jurisdiction. There is no objection to service out of the jurisdiction. It is only the same thing as an advertisement giving notice to the debtor.

[They also referred to *Ex parte Thorold* (1), *Ex parte Bunny* (2), and *Drummond* v. *Drummond* (3).]

SIR W. M. JAMES, L.J. :—

In this case a gentleman resident in *Ireland* has been adjudicated bankrupt. By the *Bankruptcy Act*, which received the royal assent on the 9th of August, 1869, it is enacted that any creditor of a certain amount may ask for adjudication on the ground of any of the acts therein mentioned, and thereinafter called acts of bankruptcy. The 6th of these is, "That the creditor presenting the Petition has served in the prescribed manner on the debtor a debtor's summons, requiring the debtor to pay a sum due of an amount not less than £50; and the debtor, being a trader, has for the space of seven days, or, not being a trader, has for the space of three weeks succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same." The Appellant is an Irish gentleman, who in April last was residing and living in his own house in *Merrion Square, Dublin*. While he is so living and residing, an Irish creditor applies to the Court of Bankruptcy in *England* for a debtor summons. The affidavit on which it was applied for described—and in my opinion falsely described—the debtor as residing in a place in *Great George Street, Westminster*, in which he could no more be said to reside than I can be said to reside in the rooms attached to this Court. The creditor having obtained a summons, obtained an order for leave to serve it personally on the debtor in *Ireland*. If an Irish gentleman can thus be served in *Ireland* with a summons from the English Court of Bankruptcy, on the application of an Irish creditor, the power to direct such service must exist in the case of a debtor and creditor resident in any part of the world, for in the Act of 1869 *Ireland* and *Scotland* are excepted, so that the provisions of the Act apply no more to two Irishmen resident in *Ireland* than to two Parisians.

(1) 3 M. D. & D. 274, 285; 1 Ph. 239. (2) 1 De G. & J. 309.
(3) Law Rep. 2 Ch. 32.

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If this can be done, I see no reason why a Frenchman in *Paris* may not take out a debtor summons here against a German serving in the invading army. Indeed, it was not contended that, as a universal rule, this could be done; but it was said that there were special circumstances in this case—that this gentleman for a considerable period of the year lived in *England*, in the discharge of his duties as an officer of the Government, and as the representative in Parliament of an Irish county. Whether these circumstances would have enabled him to be served when in *England* is a matter on which I feel considerable doubt; indeed, at present I feel more than doubt. It would be strange if a foreigner coming to *Southampton* by steamer could be made a bankrupt for disobeying such a summons, and I am not satisfied that there is any difference between that case and that of a gentleman who is temporarily resident here in the discharge of his duties, especially when one of those duties is that of a Member of Parliament. But of this I am satisfied, that whatever his liability may have been when he was in or near the palace of *Westminster*, or in or near his office in *Westminster*, no English taint remained in him and followed him to *Ireland*, and that when he returned thither he was as exempt from the operation of this Act as any other Irishman. I am of opinion that the English Court of Bankruptcy has no jurisdiction over a man *de facto* living in *Ireland*, and having neither *de facto* nor in the contemplation of the law any residence here.

But it is said that this was an English debt, because a judgment had been recovered here. That appears to me just as material as it would be that a bill of exchange, on which a foreigner was liable, was written on English paper with an English pen and with English ink.

Then it is said that this is *res judicata*, because the debtor took proceedings before the Registrar to get rid of the order for service. I cannot but express my surprise at the order having been obtained on such an affidavit. How any one could swear that he believed that a gentleman, who had gone home in ordinary course in the vacation, was gone away to avoid service, passes my comprehension; and I cannot but express my surprise that the Registrar did not at once discharge the order. There is nothing, however, in this Act to make the failure of the application to the

Registrar an adjudication on the point whether an act of bankruptcy has been committed. That has to be proved again both before the Registrar and before us. I am of opinion that the Appellant was entitled to treat the whole proceeding as a nullity, and that his failure to comply with the summons was not an act of bankruptcy. The adjudication must be annulled, and, considering the circumstances of the case, we order the Respondent to pay the costs of the appeal, and that in as ample a form as the Act enables us to give them.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The main question is an important one, whether a debtor summons can legally be served out of the jurisdiction of the Court of Bankruptcy. In dealing with Acts of Parliament of this description, which are intended only for particular parts of the *United Kingdom*, the true principle of construction is, that all things which are to be done under the authority of the Court must be done within the jurisdiction, unless the Act expressly or by necessary implication enables them to be done elsewhere. Now the *Bankruptcy Act* of 1861, sect. 78, contained express provisions as to a trader debtor summons, which enabled it to be served out of the jurisdiction, but only where the debtor had a usual or last known place of abode in *England;* and it went on to give the Court a discretion as to the mode and form of service out of the jurisdiction, and as to the time for the debtor's appearance, so as to prevent injustice being done. That Act has been repealed, and we come to sect. 6 of the Act of 1869, which mentions the different acts of bankruptcy; and where it intends to apply to acts out of the jurisdiction, it says so. In the 1st, 2nd, and 3rd clauses, cases out of *England* are expressly referred to. Clause 4, by its nature, relates exclusively to *England.* In clause 5 the terms are general, it not being said that the execution must have issued from an English Court; but nobody can doubt that it relates only to an execution in *England*, for it cannot be supposed that an execution in *Ireland* can make a man a bankrupt here. We then come to the 6th clause, which relates to the debtor summons, and we find that a debtor is to be deemed to have committed an act of bankruptcy by default for a limited time; no such dis-

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cretion as to time being given to the Court as was given by the former Act. Now, can it be supposed to have been the intention of the Legislature that if a trader is served with a summons in any part of the world and does not pay, or secure, or compound for the money within seven days, he commits an act of bankruptcy? Without reference to the rules, I say that such a construction would not be the true construction of the Act. We then come to the General Order of January, 1870. The Act prescribed a time for payment after service, but not a time for service of the summons. The 59th Rule of the Order prescribes for that service a fixed period of twenty-one days, within which period it would, in many cases of persons out of the jurisdiction, be impossible to serve it; and there is nothing in any of the rules to lead us to suppose that service of a summons out of the jurisdiction was contemplated, though the attention of the framer of the rules was called to service out of the jurisdiction, the service of a Petition for adjudication out of *England* being expressly provided for. The service of a summons is to be effected by an officer or bailiff of the Court, or by the creditor or his attorney. Are they to be sent to all parts of the world? If personal service cannot be effected, the Court may grant an extension of time; but it can order substituted service only in cases where the debtor is keeping out of the way to avoid service; and this cannot be said of a person who was out of *England* when the summons was issued; and the reference to the usual or last known place of residence or business evidently means in *England*. It seems to me that, on the true construction of the Act and Rules, the summons can only be served in *England*. I do not see that any great injustice can be done by this; for if a person, in order to defeat his creditors, leaves *England*, or, being a trader, keeps abroad, he thereby commits an act of bankruptcy. But if a person is abroad because his usual place of residence is abroad, I do not think that the Legislature intended him to be made bankrupt here.

I think there is not much in the argument that this is *res judicata*. A question often arises, first, on an interlocutory application, as on motion for injunction; then at the final hearing. The decision on the motion does not conclude the parties, and the present case is similar. We have nothing to do with the reasons

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given by the Registrar; if there is any estoppel, it must be on the ground that an application to discharge the order for service was refused, and that this refusal stands unreversed. For anything we know, the Registrar may have refused the application merely because he thought the question too important to be decided on motion. When adjudication is applied for, the question whether an act of bankruptcy has been committed comes to be decided, and if it is decided against the bankrupt, he can appeal. I therefore entirely agree with the Lord Justice.

It is right for me to say that questions of such importance as this ought to be reserved for the personal consideration of the Chief Judge, and not brought before us after having only been heard by the Registrar.

Solicitors: Messrs. *Lawrance, Plews, & Co.;* Messrs. *Vallance & Vallance.*

Ex parte RYDER. *In re* DOUGLAS.

L. J. J.
1871
March 4.

Creditors' Deed—Date—Registration—Bankruptcy Act, 1861, *s.* 192.

D. assigned his property to trustees by deed registered under the *Bankruptcy Act*, 1861, by which it was provided that the property should be applied as if *D.* had been "at the date hereof" adjudged bankrupt. At the date of the deed and of its registration *R.* held a bill of exchange accepted by *D.*, which had not yet arrived at maturity. After the execution of the deed, but before its registration, *R.* accepted a bill of exchange drawn upon him by *D.*:—

Held (affirming the decision of the County Court Judge of *Liverpool*), that *R.* had no right to set off the two bills against each other, for that the date of the deed, and not the time of registration, was to be looked to, and at the former time there was no mutual credit.

THIS was an appeal from the decision of the County Court Judge at *Liverpool*, in a special case under the *Bankruptcy Act*, 1861, s. 56.

J. O. Ryder and *C. W. Ryder* carried on business at *Liverpool* as partners, under the firm of *James Ryder & Sons.* They were also partners, but not the only partners, in a firm of *Ryder & Co.* at *Bahia*. *William Douglas* carried on business at *Liverpool* under the firm of *Douglas & Co.*, and at *Bahia* under the firm of *Douglas, Latham, & Co.*, but was in fact a sole trader.

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On the 17th of September, 1869, *Douglas, Latham, & Co.*, at *Bahia*, drew a bill for £1000 on *Douglas & Co.*, in favour of the *Bahia* firm of *Ryder & Co.* On the 27th of September *Ryder & Co.* indorsed this bill to *James Ryder & Sons.* It was accepted by *Douglas & Co.*, at *Liverpool*, on the 21st of October, 1869. On the 22nd of January, 1870, when it became due, it was presented for payment and dishonoured, and remained in the hands of *James Ryder & Sons.*

On the 26th of November, 1869, the *Bahia* firm of *Ryder & Co.* drew a bill for £1000 on *James Ryder & Sons* of *Liverpool* in favour of *Douglas, Latham, & Co.* On the same day it was indorsed by *Douglas, Latham, & Co.* to *Douglas & Co.* of *Liverpool.*

On the 14th of December, 1869, *Douglas* executed a deed in favour of his creditors. This deed was between *Douglas* of the first part, four trustees (of whom *C. W. Ryder* was one) of the second part, "and the several persons, companies, and co-partnership firms who at the date hereof are respectively creditors of the said *William Douglas*, or who would be entitled to prove under an adjudication of bankruptcy against the said *W. Douglas*, made on the day of the date hereof, hereinafter called the creditors," of the third part. And thereby *Douglas* conveyed all his estate and effects to the trustees, their heirs, executors, administrators, and assigns, "to be applied and administered for the benefit of the creditors of the said *W. Douglas*, in like manner as if the said *W. Douglas* had been at the date hereof duly adjudicated bankrupt."

On the 15th of December, 1869, *Douglas* received the second above-mentioned bill from the *Bahia* house, and presented it for acceptance. On the 16th *James Ryder & Sons* wrote to *Douglas*, whom they knew to be in difficulties, "Our friends Messrs. *Ryder & Co.*, at the time of advising the draft in your favour, had not received value for said draft. Under your present existing circumstances we must await further information from *Bahia* prior to accepting, and when we hear of value being received, will accept as from this date."

On the 22nd of December, 1869, *C. W. Ryder* executed the above-mentioned creditors' deed, and on the 30th of December, 1869, it was registered.

On the 17th of January, 1870, *James Ryder & Sons* having received advice from *Bahia* that value had been received for the

second bill, accepted it, dating their acceptance the 15th of December, 1869. They now claimed to set off one bill against the other; and Mr. *Serjeant Wheeler*, the Judge of the *Liverpool* County Court, having decided against their claim, they presented this appeal.

Mr. *Cotton*, Q.C., and Mr. *Cohen*, for the Appellants:—

This case, we submit, is governed by *Stanger* v. *Miller* (1). The time of registration, not of execution, is the time to be looked to: *Ex parte Petrie* (2); for up to that time the deed operated only at common law, and did not pass the right of action on the bill though there are two cases which seem to treat the date of the deed as the time to be looked to: *Williams* v. *Cadbury* (3); *Selby* v. *Greaves* (4). In the present case, the language of the deed is pressed against us; but its fair construction is, that the time when the deed becomes operative under the statute is to be looked to, especially where it could not pass the subject-matter, except under the statute. Now, at the time of registration, there were cross-demands, and we are entitled to set off one against the other.

Mr. *De Gex*, Q.C., and Mr. *Charles Russell*, for the Respondents, were not called upon.

SIR W. M. JAMES, L.J.:—

I think that this case is decided by the authorities in the Common Pleas, which have been cited. The form of deed sanctioned by the Legislature expresses that the property is to be distributed as if the debtor had been adjudged bankrupt at the date of the deed, and the deed before the Court contains those terms. The case, therefore, according to the authorities in the Common Pleas, with which I must express my entire concurrence, is to be treated as if the debtor had become bankrupt on the day of the date of the deed; and on that day, beyond all doubt, there was no mutual credit between the debtor and the Appellants. The appeal, therefore, must be dismissed.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Westall & Roberts.*

(1) Law Rep. 1 Ex. 58.
(2) Ibid. 3 Ch. 232.
(3) Law Rep. 2 C. P. 453.
(4) Ibid. 3 C. P. 594.

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Feb. 18.

10 Ch 193.

In re TAYLEUR.

Lunacy—Bill to perpetuate Testimony to the Will of a Living Lunatic.

A wealthy lunatic had made two wills before he was found lunatic. The Court, without giving any opinion whether a bill to perpetuate testimony as to their validity would lie, ordered that such costs as the Master should think proper of a bill to be filed with his approbation for that purpose should be paid out of the lunatic's estate.

THIS was a Petition by the committee of the estate, asking for liberty to pay out of the estate the costs of the Plaintiffs and Defendants in a suit to perpetuate testimony as to two wills made by the lunatic, in case such suit should be instituted with the Petitioner's consent.

The lunatic was found such by inquisition taken on the 30th of September, 1858. At this time there were in existence two wills made by him, by which he exercised a power vested in him of appointing a sum of £30,000 among his younger children. There was doubt whether he was not insane at the time when the second of these wills was made. He was still living, and likely to live many years longer. The Petitioner stated that the committee had been informed by some old persons of circumstances throwing considerable doubt on the validity of the latter will, and that he had been advised that a bill to perpetuate testimony by some of the persons who, on the death of the lunatic without recovering, would acquire an interest in the £30,000, or in the property charged with it, would lie; and the committee deposed that, in his opinion, if some proceedings were not taken to perpetuate testimony as to the validity of the wills, there was considerable risk that long and expensive litigation would ensue, after the death of the lunatic, between the rival claimants under the wills respectively and persons claiming as next of kin of the lunatic. He went on to state that there were two infant children of the lunatic who were interested in the question of the validity of the wills; but that, so far as he knew, they had no person willing to act as next friend on their behalf.

Mr. *Charles Hall,* and Mr. *Yate Lee,* for the Petitioner.

Mr. *Morgan*, Q.C., and Mr. *Byrne*, opposed the application, and urged that a bill to perpetuate testimony would not lie, as no person had any interest under a will till the death of the testator. They referred to *Campbell* v. *Earl of Dalhousie* (1), *Lord Dursley* v. *Fitzhardinge* (2), *Sackvill* v. *Ayleworth* (3), *Earl Belfast* v. *Chichester* (4), and *Allan* v. *Allan* (5).

Mr. *Speed*, and Mr. *Freeling*, appeared for other parties.

SIR W. M. JAMES, L.J.:—

In this case I think that it is not necessary for us to determine whether such a bill as it is proposed to file will lie. The matter for our consideration is, whether a sane and wealthy father, if a question so seriously affecting as this does the interests of his children arose with reference to the property of another person, would not give them an opportunity of trying it. If he would, then I think that in this case the Court, acting on behalf of an insane and wealthy father, may do so. The suit must only be instituted with the approbation of the Master, who must be satisfied that there is reasonable ground for it, and such costs of it as he shall think proper may be paid out of the estate.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *G. J. Brownlow*; Mr. *C. E. Shea*.

(1) Law Rep. 1 H. L., Sc. 462.
(2) 6 Ves. 251, 260.
(3) 1 Vern. 105.
(4) 2 Jac. & W. 439.
(5) 15 Ves. 120.

For order in the above case see Elmer's Practice in Lunacy (5th Edn. 1879) p 212. No 142 b.

L. C.
1870
Nov. 3.

M'CREA *v.* HOLDSWORTH.

Design—Registration of Pattern—Infringement.

Where a pattern of an article has been registered under 21 & 22 Vict. c. 70, s. 5, the design will be infringed by an article to all appearance the same, though not actually identical.

Observations in *Holdsworth* v. *M'Crea* (1) explained.

THIS was a suit to restrain the Defendants from copying a design for ornamenting a woven fabric which had been protected under the *Copyright of Designs Acts* (5 & 6 Vict. c. 100, and 21 & 22 Vict. c. 70, s. 5), by registering a pattern of the article.

The hearing of the suit stood over for the Plaintiff to establish his right at law. He accordingly brought an action against the Defendants, in which the jury found that the Plaintiff's design was a new and original combination, had been registered, and had been infringed; and they gave 40*s.* damages. The Defendants then obtained a rule to enter the verdict for the Defendants, on the ground that the registration was bad.

The rule was discharged by the Court of Queen's Bench; that decision was affirmed by the Court of Exchequer Chamber, and afterwards by the House of Lords, as reported (1).

The suit was then brought on to be heard before the Vice-Chancellor *James*, who directed an inquiry as to damages, and ordered the Defendants to pay the costs of the suit.

The Defendants appealed.

Mr. *Bristowe*, Q.C., and Mr. *Ince*, for the Appellants:—

The Plaintiff has recovered 40*s.* damages at law; those are his damages, and he has no right to any more. He has made out no case for more than he has obtained at law.

Moreover, we have not, in fact, infringed. We relied at law on the invalidity of the registration, and *per incuriam* did not seriously dispute the infringement. But now that the case comes before this Court, we maintain that we have not infringed. The Plaintiff has chosen to register his design by furnishing a pattern only,

(1) Law Rep. 2 H. L. 380.

and therefore nothing but that very pattern will be protected. Now, there is a variation between our pattern and that of the Plaintiff, therefore we have not copied the thing which he has chosen to register, and the only thing for which he is entitled to protection. This was clearly the opinion of the learned Lords who decided the case (1); we claim the benefit of that opinion, and maintain that this bill ought to be dismissed with costs; or else, if the Plaintiff disputes the fact, the Court ought, with or without a jury, to try the question.

Mr. *Kay*, Q.C., and Mr. *C. Hall*, for the Plaintiff, were not called upon.

LORD HATHERLEY, L.C.:—

I think this is really a very idle contention. It seems to me an attempt to give a meaning to some words used in the House of Lords totally opposite to anything that was intended by the noble Lords who used those words.

It has been argued that, when a design of this kind is registered, and the designer, instead of describing the design in words, chooses to place the design itself upon the register in the shape of a part of the article designed, then he is tied down to that identical design so exhibited, and is not at liberty to complain of any person making a thing which is to all outward appearance exactly the same, and which, for all purposes for which the thing is manufactured, is identical. And it has been argued that, if the person who exhibits a design for all practical purposes identical with the registered design is astute enough, as in this case, to turn what is called a "star" in the opposite direction upon the pattern, though it is of exactly the same dimensions and effect to the eye, he may do so with impunity.

The question appears not to have been raised at the trial, where the Judge and the jury considered the articles as identical for the purpose for which they were made; and I imagine that the observations made by some of the learned Lords, and relied upon by the Defendants, were intended to say merely that the design could be protected only as it was represented; and the learned Lords

(1) Law Rep. 2 H. L. 384, 387, 388, 390.

L. C. 1870 M'Crea v. Holdsworth.

considered that the question whether there was any difference in the effect would be left to the jury. Their Lordships seem to have meant that the designer is not bound, as in a patent case, to distinguish the new from the old, and is allowed to register his pattern without distinguishing what is new from what is old; but if he chooses to put it in that way, it will not be protected as against the public in case they choose to use any portion in any manner substantially differing from the registered design. If the designs are used in exactly the same manner, as I hold they are in this case, and have the same effect, or nearly the same effect, then of course the shifting or turning round of a star, as in this particular case, cannot be allowed to protect the Defendants from the consequences of the piracy.

This case has been twice before a jury. They have found what seems to be clearly established, that this is an invention of the Plaintiff's. It has been established by the decision of the House of Lords, confirming the judgment of the Exchequer Chamber, together with the previous judgments. The novelty is therefore fixed and settled; and we find that, the parties, as a matter of common sense, instead of leaving it to the jury to say infringement or not infringement, did not trouble the jury to consider that question, but agreed at once to take that verdict which on both sides was felt to be the proper verdict on that point.

I think that the verdict was entirely right; that the decision of the Vice-Chancellor is also entirely right; and, therefore, that this appeal must be dismissed with costs.

Solicitors: Messrs. *Edwards, Layton, & Jaques;* Messrs. *Emmets, Watson, & Emmet.*

In re BANK OF LONDON AND NATIONAL PROVINCIAL INSURANCE ASSOCIATION.

L. C. 1871 Feb. 13.

Winding-up—Unregistered Life Insurance Company—Joint Stock Companies Acts, 1844, 1856—*Joint Stock Companies Act Amendment Act*, 1857—*Companies Act*, 1862, *s.* 199.

The effect of the *Joint Stock Companies Act Amendment Act*, 1857 (20 & 21 Vict. c. 80), was to leave the *Joint Stock Companies Act*, 1844 (7 & 8 Vict. c. 110), repealed as to insurance companies formed in the interval between the passing of the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), and the passing of the Act of 1857; and therefore such companies were not required to be registered; and they may be wound up as unregistered companies under the *Companies Act*, 1862.

THIS was a Petition of appeal from an order of Vice-Chancellor *James*, made on the 22nd of January, 1870, by which he ordered the *Bank of London and National Provincial Insurance Association* to be wound up.

The company was provisionally registered under the *Joint Stock Companies Act*, 1844 (7 & 8 Vict. c. 110), on the 28th of April, 1856. On the 14th of July, 1856, the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), was passed. On the 24th of July the deed of settlement was tendered for registration, but the Registrar of Joint Stock Companies refused to register it, considering that he had no power to do so in consequence of the new Act.

The shareholders accordingly executed a deed of mutual release of their rights under the old deed of settlement, and on the 24th of August, 1856, they executed a fresh deed of settlement, to which *J. A. Durham* was a party, by which the company was reconstituted as an unregistered fire and life insurance company; but provision was made for the execution of a supplemental deed, if authorized by a special general meeting, in case any Act of Parliament should be passed enabling the company to be registered.

On the 25th of February, 1858, the directors granted an annuity of £600 to *George Thompson*, which formed the debt upon which the Petition to wind up was founded.

The company continued to carry on business as an unregistered company until the winding-up order; and on the 7th of October, 1858, became amalgamated with the *Albert Insurance Company*, which was also now being wound up by the Court.

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The Appellants were the executors of *J. A. Durham*, formerly a shareholder in the company, who had been settled on the list of contributories on the 16th of December, 1870, and had obtained special leave to present this Petition of appeal against the winding-up order.

Mr. *Mackeson*, Q.C., and Mr. *W. W. Cooper*, for the Appellants:—

We contend that the company ought to have been registered under the *Joint Stock Companies Act*, 1844 (7 & 8 Vict. c. 110), and as it was not, it was an illegal company, and there is no debt on which the winding-up Petition could be founded. This depends upon the construction of the *Joint Stock Companies Acts* of 1856 and 1857. By the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), s. 107, it is enacted that the *Joint Stock Companies Act*, 1844, shall be repealed; but by the 2nd section it is provided that, "This Act shall not apply to persons associated together for the purpose of banking or insurance." This section governs the whole Act, so that the *Joint Stock Companies Act*, 1844, was not repealed by the 107th clause so far as it affects banking and insurance companies. Then the *Joint Stock Companies Act*, 1857 (20 & 21 Vict. c. 14), s. 23, suspends the repeal of the *Joint Stock Companies Act*, 1844, as to such companies as had been registered under that Act, until they should have obtained registration under the *Joint Stock Companies Acts*, 1856, 1857, and, subject to that, re-enacts the repeal. But as the Act of 1857 incorporates the Act of 1856, the repealing clause of the Act of 1857 did not affect insurance companies; and the matter was left as it stood under the Act of 1856. But as doubts were caused by this complication of Acts, the *Joint Stock Companies Act Amendment Act* (20 & 21 Vict. c. 80), was passed on the 25th of August, 1857, which declared that the *Joint Stock Companies Act*, 1844, had not been repealed as to insurance companies previously formed under that Act or thereafter to be formed, and indemnified persons who had acted, and supported acts which had been done, in companies previously formed under the Act of 1844, on the supposition that it had been repealed (1).

(1) 20 & 21 Vict. c. 80, s. 1: "The *Joint Stock Companies Acts*, 1856, 1857, shall not, nor shall either of them, be deemed to have repealed as respects

But that Act, being merely declaratory, cannot be taken to have enacted that, as to a third class of insurance companies, namely, those which, like the present, were formed before the passing of that Act, and yet not under the Act of 1844, the Act of 1844 was to be considered repealed. This company came under neither of the two classes referred to in the declaratory Act of 1857; but as soon as that Act passed they ought to have got themselves registered under the Act of 1844, and thus brought themselves within the class of companies "thereafter to be formed." But they did not do so, and therefore still remained an illegal company, and the contract with *Thompson* was void: *Ewing* v. *Osbaldiston* (1); *Agriculturist Cattle Insurance Company* v. *Fitzgerald* (2); *Abbott* v. *Rogers* (3); *Bull* v. *Chapman* (4); *Mestaer* v. *Gillespie* (5); *Harris* v. *Amery* (6). The object of the Legislature has been to oblige all public companies to register, and that object must be borne in mind in construing the Acts: *Rex* v. *Rogers* (7); *Pretty* v. *Solly* (8); *Surtees* v. *Ellison* (9); *Grisewood and Smith's Case* (10); *Hawkins* v. *Gathercole* (11); *Kerr* v. *Brown* (12).

Secondly, we contend that the company, being entirely unregistered, is not within the *Companies Act*, 1862, Part VIII. It would

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companies already formed for the purpose of carrying on the business of insurance under the Act passed in the 8th Vict. c. 110, or as respects companies hereafter to be formed for the said purpose, the said Act passed in the 8th Vict. c. 110, or any other Act amending the same or relating to such companies: Provided that, if any insurance company formed under the said Act of 8th Vict., or the directors of, or shareholders in, any such company, have during the interval between the passing of the said *Joint Stock Companies Act*, 1856, and of this Act, acted as if the said Act of 8th Vict. had as to such company been repealed by the said *Joint Stock Companies Act*, 1856, then so far as affects the mutual rights and relations of the said company, its directors and officers, and late or present shareholders, and so far as affects any penalties which the said company or its directors, officers, or shareholders, may have incurred by non-observance of the said Act of the 8th Vict., the said Act of the 8th Vict. shall, as regards the actions of the said company, its directors and shareholders, during such interval as aforesaid, be deemed to have been repealed.".

(1) 2 My. & Cr. 53, 85.
(2) 15 Jur. 489.
(3) 1 Jur. (N.S.) 804. 16 CB 277
(4) 8 Ex. 444.
(5) 11 Ves. 642.
(6) Law Rep. 1 C. P. 148. 12 Jur NS 165
(7) 10 East, 569.
(8) 26 Beav. 606.
(9) 9 B. & C. 750.
(10) 4 De G. & J. 544, 557. 5 Jur NS 1191
(11) 6 D. M. & G. 1, 21. 7 Jur NS 481.
(12) Joh. 138, 152. 5 Jur NS 457

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appear, from the 199th section, that the meaning of "unregistered companies" is companies "not registered under the Act of 1862," not unregistered altogether. The 209th section enacts the compulsory registration of insurance companies completely registered under the Act of 1844, and every company required to be registered under "the *Joint Stock Companies Acts*," which expression, by the 175th section, is not to include the Act of 1844. So that an unregistered company in the condition of the present company was not contemplated by the Act: *Bowes* v. *Hope Mutual Insurance Company* (1); *In re Torquay Bath Company* (2); *In re London Indiarubber Company* (3). It may also be contended that the words "incorporated by Act of Parliament" in the 199th section apply to all companies, not merely to railway companies, and that no unregistered company can be wound up unless it has been incorporated by Act of Parliament. But we do not rely upon that construction.

Mr. *Fry*, Q.C., and Mr. *Jackson*, for the Petitioner, and

Mr. *Eddis*, Q.C., and Mr. *Rodwell*, for the official liquidator:—

The effect of the *Joint Stock Companies Act*, 1856, and the first Act of 1857, was to repeal the Act of 1844 entirely. The second Act of 1857 (20 & 21 Vict. c. 80) was not declaratory, but enactive. It was based upon the understanding that the Act of 1844 had been entirely repealed—whether from inadvertence or not is of no importance—and it revives it as to the two classes of insurance companies, namely, those which had been registered before the repeal, and those which might be formed after the 25th of August, 1857. As this company comes within neither of these classes—as is admitted by the other side—the Act remained repealed as to it. We do not deny that if it had been formed after the 25th of August, 1857, it ought to have been registered, but it was formed in the interval, upon the faith of the Act of 1844 having been repealed, as a common law partnership, and the rights of the creditors against it have never been taken away. If it had been intended to revive the Act against companies in our position, or to declare that it had never been repealed as to them, the clause of indemnity would have been framed so as to reach them, and there would have been regulations as to the time and mode of their registration.

(1) 11 H. L. C. 389. (2) 32 Beav. 581. (3) Law Rep. 1 Ch. 329.

11 Jur. N.S. 643. 9 Jur. N.S. 633.

As to the objection that this company does not come under Part VIII. of the *Companies Act*, 1862, cases have continually occurred in which unincorporated companies, which have never been registered under any Act, have been wound up. *In re Family Endowment Society* (1) was such a case. The *Joint Stock Companies Act*, 1856, repealed the 7 & 8 Vict. c. 110, under which such companies might have been wound up in Bankruptcy, and if they did not come under the new Act, they were left without remedy.

Mr. *Mackeson*, in reply.

LORD HATHERLEY, L.C. :—

This case has been very fully and ably argued on both sides. One point which was raised by Mr. *Mackeson*, but which he very fairly afterwards abandoned, was that companies which had not been registered under any Act could not be wound up under Part VIII. of the *Companies Act*, 1862, unless incorporated by Act of Parliament. Every company registered under any other Act than the Act of 1862 is considered unregistered for the purposes of that Act; but the converse does not hold: that companies not registered under any Act at all do not come under the term "unregistered companies."

The important question in the case is, what was the effect of the repealing Act of 1856 (19 & 20 Vict. c. 47) when compared with the two Acts of 1857 (20 & 21 Vict. c. 14 and c. 80) upon the Act of 1844 (7 & 8 Vict. c. 110). Now the Act of 1856 deals with the Act of 1844 in this manner: The Act of 1844 had provided for the registration of certain companies, including insurance companies, and provided an office for that purpose. Then came the Act of 1856, which recited that it was expedient that the law should be consolidated and amended, and provided, in the 2nd section, that "the Act should not apply to persons associated together for purposes of banking or insurance." This Act contained the repealing clause (sect. 107) which was the origin of the present contention. That section repealed the Act of 1844; but with this proviso, that the said repeal should not take effect with respect to any company completely registered under the Act of 1844, until such company had obtained registration under the repealing Act, as thereinafter

(1) Law Rep. 5 Ch. 118.

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mentioned. The argument, which was not without force, has been that, inasmuch as sect. 2 said that the Act was not to apply to insurance and banking companies, they were not affected by any of the other sections, and, among others, by the repealing clause; in other words, that insurance and banking companies would have to be registered under the Act of 1844, and all other companies under the Act of 1856; that they were, in fact, excluded from the operation of the Act, in the same way as *Scotland* is excluded, if an Act contains a clause to that effect. If that were the case, it would produce a strange result as to the offices for registration, for an elaborate machinery had been established under the Act of 1844, as well as under the Act of 1856, so that there would be two staffs acting at once, although, of course, the Board of Trade might appoint the same Registrars under both Acts. I do not think that the exception, in the repealing section, of certain companies is conclusive as shewing that there was no other exception from the repeal, and therefore that the exception in sect. 2 did not apply. Nor do I attach much importance to the exception of insurance companies in sect. 27 of the Act of 1857 (20 & 21 Vict. c. 14). I think it is merely surplusage; and, unfortunately, such surplusage is not uncommon in Acts of Parliament.

The real question is, what construction the Legislature has itself put upon these Acts.

When the *Amendment Act* of 1857 (20 & 21 Vict. c. 80) was passed there were two constructions before Parliament: one, which treated the Act of 1844 as repealed for all purposes—a construction certainly not unreasonable, for the Registrar took that view, and declared his office abolished, and refused to register the deeds brought to him, thereby placing those who brought them in a very awkward position, if his construction was not the true one. And there was the other construction, that the Act of 1844 was still unrepealed as to such companies. Under these circumstances the Legislature passed the 20 & 21 Vict. c. 80, and made provision for this difficulty. In doing so they had three classes of cases to deal with. First, there were companies formed under the Act of 1844; and if the Act were really repealed, questions might arise as to the validity of acts done by them; and it was, therefore, desirable that companies formed, that is, completely registered, under that

Act should have their acts confirmed. Secondly, there were companies, like the present—for there is no reason to suppose that this is the only one—which were formed by persons who considered that the Act was repealed, and therefore formed themselves into a partnership at common law. Thirdly, there were persons who might wish to form themselves into a company thereafter. Upon this the Legislature chose to draw the Act, not as a declaratory Act, but as assuming a construction and amending the Act of 1856. Therefore they enact that the Acts of 1856 and 1857 shall not be deemed to repeal the Act of 1844 as respects insurance companies already formed under the Act of 1844, or as to companies thereafter to be formed; in other words, they take the Acts of 1856 and 1857 to have repealed the Act of 1844; but as to certain companies and persons, that is, the first and third classes I have mentioned, they enact that it is not to be repealed: they sweep them out of the repealing clause. It would have been unnecessary to do this if it had been simply a declaratory Act. The Act was not to be deemed repealed as to those two classes; and therefore, on the principle *expressio unius exclusio alterius*, it was to continue repealed as to the third class, which includes the persons constituting the present company. Then the Act provides, that as some persons in the first class, as to which the Act is deemed not repealed, have acted as though it had been repealed, they are to be freed from penalties in respect of those acts. I agree that the enactment is not clearly expressed, but I think the meaning is intelligible. It is impossible to suppose that the Legislature was so tender as to those who had treated the Act as not repealed, and neglected those who followed the course which turned out to be right, and took a correct view of the Act. The Legislature having repealed the Act, changed their minds as to the Act, and said they would revoke the repeal, but they would not make the enactment date back so as to affect the rights of any persons by an *ex post facto* law. The effect of the previous Acts was certainly doubtful, but the Legislature has clenched the construction to be put on them by the Act of 1857. The appeal must therefore be dismissed with costs.

Solicitors for the Appellants: Messrs. *Tayloe & Baxter.*
Solicitors for the Petitioners: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Official Liquidator: Messrs. *Paine & Layton.*

L. JJ.

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Feb. 16, 20, 21, 22; *March* 13.

5 Ch D. 603
4 Ch D. 253, 6,

PHILLIPSON *v.* GIBBON.

Statute of Limitations—Boundary Wall—Specific Performance—Costs.

The purchaser of a house in *London* having taken various objections to the title, the vendor filed a bill for specific performance, and obtained the usual reference as to title. All the above objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the *East India Company*, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them:—

Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adverse to the *East India Company*:

Held, that the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, and that therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs.

Decision of *Malins*, V.C., reversed.

THIS was an appeal by the Defendant, a purchaser, from an order on further consideration made by Vice-Chancellor *Malins* in a suit for specific performance, ordering a completion of the sale with costs to be paid by the Defendant.

The case was one where the contract was not disputed; but owing to objections taken by the purchaser to the title, the vendors filed their bill; and on the 13th of July, 1869, a decree for specific performance was made, with the usual inquiry whether the Plaintiffs could make a good title, and if so, when it was first shewn. The title was referred to the conveyancing counsel, who, on the 9th of August, 1869, gave his opinion that a good title had been shewn on the 2nd of May, 1868, which was before the filing of the bill.

On the 1st of November, 1869, the certificate approving of the title not having then been signed, the managing clerk of the Defendant's solicitors made an affidavit stating that he had, by

inspecting the property, discovered the circumstances mentioned below as to a stone and watchbox, which circumstances had not been known during the proceedings in Chambers.

The property sold consisted of three adjoining houses fronting to *Bishopsgate Street*, and numbered 31, 32, and 33. On the south side the property was bounded by *New Street*, along which it measured about ninety-three feet. In the wall of the house which adjoined *New Street*, being almost wholly a blank wall, was a stone at about the height of the first-floor, with the following inscription:—

"This wall, being ninety-three feet in length from east to west, and from the face of this stone eighteen inches in substance, is the property of the *East India Company*, erected at the sole charge of the company, May 26, 1776. At the same time the ground eighteen feet south from this stone, which had been purchased by the *East India Company*, was given to the public for widening the entrance into this street."

The same clerk discovered by his above inspection that a watchbox on the *New Street* front of the premises, which was marked on the plan accompanying the particulars of sale, occupied a space of 5 ft. 5 in. square lying within the above-mentioned wall, and entered through it, and he found on inquiry that the key of the door to this watchbox was in the possession of the *St. Katharine's Docks Company*, to whom the adjoining property of the *East India Company* had been sold.

The Defendant, on discovering these circumstances, communicated with the acting secretary at the India Office to know whether the wall was claimed by the Secretary of State for *India* as having been the property of the *East India Company*, and with the *St. Katharine's Docks Company* as to the watchbox, and found that they did claim to be owners.

On behalf of the Plaintiffs, it was deposed by their solicitor that their predecessors in title had demised the house, in July, 1831, for a term of seventy years, and that shortly afterwards the tenant, in pursuance of a covenant in the lease, had rebuilt the wall in which the stone was found, and had, as the deponent believed, inserted the stone in the wall without the authority or knowledge of the

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owners, and that from 1831 to the present time no acknowledgment of the title of the *East India Company*, or of those claiming under them, had ever been given by any person in possession of the property, and that the Plaintiffs were advised that they had a good title by adverse possession, but that, by way of precaution, they had applied to the Secretary of State for *India* and to the dock company to release all claims to the wall and watchbox, which they had respectively agreed to do, and that a draft of such release had been approved on behalf of the Secretary of State for *India*, and was expected daily to be returned approved on behalf of the dock company.

On these materials the inquiry as to title was proceeded with; and on the 31st of January a certificate was made that a good title had been first shewn on the 2nd of May, 1868. The Defendant took out a summons to vary this certificate. The summons was adjourned into Court to come on with the hearing for further consideration, and was dismissed with costs by Vice-Chancellor *Malins*, who made an order on further consideration for completion of the purchase and for the payment by the Defendant of the costs of the suit (1).

(1) 1870. June 28.

SIR R. MALINS, V.C.:—

The certificate was made on the 9th of August; and considering Mr. *Hall's* experience in such matters, I think the purchaser might well have been satisfied with his opinion that a good title was shewn. In the following month of September, however, being determined, if possible, to find some ground for getting out of his contract, he makes two, as he conceives, notable discoveries. He goes and looks at the house, which has a small frontage, only about fourteen feet, in *Bishopsgate Street*, but is bounded on the south by a long flat wall of more than ninety feet deep in a street called *New Street*, which runs out of *Bishopsgate Street*, and I cannot conceive it possible that a professional man like Mr. *Gibbon* could have bought this house without first looking at it; and I assume that he did look at it first, and no doubt looked at it frequently afterwards. He was bound by the conditions of sale to take all his objections to title within ten days after the delivery of the abstract; he was bound, therefore, before the matter was before Mr. *Hall*, in August, 1869, to take all objections founded on anything that he could have discovered. I agree that if anything had been studiously concealed from him, he would have been entitled to take advantage of it afterwards; but that which was patent to him at that time he was bound to make a ground of objection then; and if he did not make it a ground of objection at that time, I am of opinion, upon every principle of justice between vendor and purchaser, that he was precluded from doing so afterwards. With regard to the main objection, it is said

Before the hearing of the appeal, the rights of the Secretary of State for *India* and of the *St. Katharine's Docks Company* had been

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that on the south boundary wall of this house—that is, the wall which alone supports the house, which makes it a house, without which it cannot be a house, and which, if removed, down comes the house altogether—that on that wall there is written in letters on a stone, I think it is stated twelve feet from the ground, in letters an inch and a half in size, so that nobody could walk along there without seeing it, this statement:—[His Honour read the inscription.] This stone, according to the statement of the Defendant, has been there nearly a century; but it turns out that it was put there in 1831 or 1832, when the house was rebuilt, not by the owner in fee, but by the tenant; however, it has been there for many years, certainly between thirty and forty years. I quite agree that casual passers-by might pass without noticing it; but a man who bought the house would see it, and ought to have seen it, and was bound to see it if it was of any consequence.

But, however, this great discovery having been made, the matter was brought before me personally at the request of the parties in January last. I heard them; it is very true it was not argued by counsel; but I heard experienced solicitors on both sides. The gentleman who now instructs Mr. *Pearson*, to whom Mr. *Gibbon* has committed the whole management of this affair, urged all that he could, and I am bound to say that, after all the lengthened argument I have heard to-day, I have not heard anything worth hearing that was not urged upon that occasion. Upon this point being raised before me, I asked the question, Have the *East India Company*, or anybody claiming under them, ever received an acknowledgment of title, or have they received any rent for the use of the wall? I was told that nothing of the kind had taken place. Am I, therefore, bound, because a wall was erected in 1776, nearly a century ago, by the *East India Company*, to assume that it belongs to them now, no acknowledgment of title since that time, no payment, no recognition, no act of ownership being shewn? What would anybody presume under such circumstances? That the right of the wall is in the man that has got the house. What could be the value of the right to the wall? Can anybody suppose, when the Plaintiff and his predecessors in title had been in possession nearly forty years of a house supported only by that wall, that anybody claiming under the *East India Company* could pull the wall down? The thing is so ridiculous and contemptible that one wonders how the time of the Court can have been occupied in arguing such a case. I dare say I shall expose myself to being thought very wrong by Mr. *Colt*, who has expressed a very positive opinion that this is a very clear case for my coming to the conclusion that no title has been shewn. In my opinion the title is perfectly clear. If it was an objection to the title, which I am of opinion it was not, it was the duty of Mr. *Gibbon* to take it as an objection to the title, when he knew, or was bound to know, of the objection, before the matter went before the conveyancing counsel, if there was anything in it. But not making it a ground of objection at the proper time, I am most clearly of opinion—I will not say it is so frivolous as the watchbox, but

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effectually transferred to the Plaintiffs. Various objections to the title were discussed on the hearing of the appeal; but none of them, except the above, appear to call for a report.

Mr. *Pearson*, Q.C., and Mr. *F. H. Colt*, for the Appellant:—

A good title was not shewn till after the filing of the bill. The wall is important; for if it belonged to a third party we could not make a door or window into *New Street;* and the Plaintiffs had no title to this wall when they filed their bill. It may have been rebuilt, but the stone declares the ownership; and though, no doubt, the Plaintiffs have acquired an easement of support, there was no ouster of the *East India Company*, so as to give a title to the wall by virtue of the *Statute of Limitations*. The vendors, therefore, ought to pay the costs of suit.

Mr. *Glasse*, Q.C., and Mr. *Boyle*, in support of the order:—

The wall was pulled down and rebuilt by the tenant of the house, under an agreement with his landlord; this is evidence of the ownership of the wall being in the owners of the house, and the putting up this stone is not sufficient to rebut it. The *Statute of Limitations* has run; for such an acknowledgment as that of the inscription, supposing that it was put up again as an acknowledg-

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there is very little difference between the two—the ownership of the wall was in the owner of the house. Nobody could have exercised an adverse right, and I repeat what I have said already, that I am surprised that under the circumstances anybody representing the Indian Council should have taken anything whatever for the abandonment of the right; but it appears they have made up their minds to take ten guineas that has been given, and also that the *London Dock Company* has claimed a present payment of £100 for setting this matter right. It has been gravely argued that I am bound to come to the conclusion that the title was bad because the vendors have paid this money and thereby acknowledged that it is so. I cannot take that view of the case at all. The vendors, finding that they have a very troublesome purchaser to deal with, thought it prudent to doubly arm themselves; and although they think they have a perfectly good title without this, they say, "In order to prevent the possibility of this contract failing, we will be armed in case the Court should think there is anything in the objection, in order that, instead of our bill being dismissed for want of title, we may go back and have the question of title settled."

I am clearly of opinion that the whole ground of objection entirely fails; therefore I refuse the summons to vary the Chief Clerk's certificate with costs.

ment, cannot take the case out of the statute, which gives effect only to a signed acknowledgment. The costs of the suit depend on the question, which party was right in the disputes which led to litigation: *Bridges* v. *Longman* (1); and here all points that were in dispute before decree have been settled in favour of the Plaintiffs. *Incorporated Society* v. *Richards* (2), *Burroughs* v. *M'Creight* (3), and *Scott* v. *Nixon* (4), are in our favour, as shewing that the statute applies.

Mr. *Pearson*, in reply, referred to *M'Queen* v. *Farquhar* (5) and *Lewin* v. *Guest* (6) on the question of costs.

March 13. SIR W. M. JAMES, L.J., delivered the judgment of the Court, as follows:—

This is a suit for the specific performance of a contract for the purchase of a house in the *City of London*. The contract was admitted, but specific performance was resisted on the ground of a want of sufficient title in the vendors. After some correspondence between the parties—set out, I think, at needless length in the pleadings—the vendors filed their bill. The purchaser alleged, in his answer, certain specific objections to the title, all which have been held, and in our opinion, rightly held, not to be sufficient objections. But before the certificate approving of the title had been signed a very serious defect of title was discovered; a defect not in any way disclosed or raised by the abstract, but discovered by the purchaser's inspecting the property, and finding that there was upon the house in question a tablet, in a conspicuous position, announcing, in substance, that the southern wall of the house had been built by the *East India Company*, on ground of their own, nearly a century ago, upon the occasion of the widening of the street, and remained their property. This objection appears to us to be a very serious one. It was, in truth, a statement on the property itself that the wall, forming a substantial part of the property, had been erected by, and was the boundary wall of the adjoining

(1) 24 Beav. 27.
(2) 1 D. & War. 258.
(3) 1 J. & Lat. 290.
(4) 3 D. & War. 338.
(5) 11 Ves. 467.
(6) 1 Russ. 325.

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owner; for the *East India Company* of course continued to be the owners of the soil of the street, although dedicated to the public. There was nothing whatever to lead to the presumption that any title had been gained adverse to that of such adjoining owner by adverse possession. Where there is a boundary-wall, and that boundary-wall remains undisturbed, and an inscription is allowed to remain on it which states to all the world that it is the boundary-wall of the adjoining proprietor, it seems to us idle to suppose that any question of the *Statute of Limitations*, or of adverse possession, or of cesser of possession, could properly arise. It was, therefore, manifest that the wall belonged to the *East India Company*; there being this further element in the case, that a purchaser from the *East India Company*, that is to say, the *St. Katharine's Docks Company*, had got in that very wall a watchbox, the key of which remained in the custody of some official of that company.

It appears to us, therefore, that at that time the vendor had not a good title; and not having a good title, he could not have shewn that which he had not got; and the finding that was made in the suit, that a good title had been shewn before the commencement of the suit, appears to us erroneous, and one which ought to be discharged. A good title was not made and was not shewn until the conveyances which were afterwards obtained had been obtained from the *East India Company* and from the *St. Katharine's Docks Company.*

In this state of things a somewhat difficult question arises as to what is to be done with the costs of the suit. As an ordinary rule costs are not given to, but generally given against, a vendor, up to the time at which he has first shewn a good title. But there is also another general rule, that if a purchaser has taken certain objections to the title of the vendor, and those objections which have been the cause of the litigation are overruled, the vendor will be entitled to his costs, and the purchaser will not escape paying them by reason of some evidence, the want of which was never the subject-matter of dispute between them, not having been supplied until the title is investigated in Chambers. The present case, however, somewhat differs from that. Here the defect was not the mere want of a piece of evidence, which could have been had at any time if asked for; nor was it any mere formal defect, it was a

substantial defect of title, about which, of course, the purchaser could not have raised any question before the institution of the suit, because he did not know of it. At the same time, if it had been known, in all probability it would have been remedied in exactly the same way as it was remedied, by getting in that which the vendors must have found it necessary to get in, either for this purchaser or any other purchaser. That being so, there was not altogether an absence of fault on the part of the vendors in the matter. It is evident that the vendors personally were quite ignorant of the fact that there was this obvious defect on the face of the property, but I think that they ought to have known it; and if people who are engaged in getting up conditions of sale do not make themselves acquainted with all the facts with which by using reasonable diligence they would have become acquainted, they cannot be considered wholly free from blame. At the same time it is to be observed that the purchaser might, either himself or by his surveyor, have looked at the property, as people who are about to buy generally do; and if either of the parties had gone and looked at it, it appears to me obvious from the evidence that the defect would have been known to both of them.

That being so, we are of opinion that the justice of this case will be met by not giving any costs either to the Plaintiff or Defendant, except the costs of one part of the proceedings, which we think ought to be distinguished. The Defendant offered in a very early stage of the proceedings to have a common reference to Chambers as to title. There was a contract not disputed, there was no question whatever between the parties except as to title, but the Plaintiff declined the offer, being desirous of obtaining a declaration that the Defendant had accepted the title, which declaration he failed to obtain. That being so, we think that the vendor ought to pay the costs of the first hearing, those costs having, as we think, been unnecessarily and oppressively occasioned. And I desire to add, that in almost every case it is the duty of a vendor, where there is no question but that of title between him and the purchaser, to avail himself of the opportunity of having an immediate reference as to title, and so saving the multiplication of unnecessary costs.

The order will be to discharge the finding that there was a good

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title made before the hearing; and then direct that no costs shall be given on either side, except the costs of the original hearing before the Vice-Chancellor, which costs the vendor must pay to the purchaser.

Solicitors: Messrs. *Langley & Gibbon;* Messrs. *Norton, Son, & Elam.*

L. JJ. 1871 *April* 19, 20.

UPPERTON *v.* NICKOLSON.

Specific Performance—Vendor and Purchaser—Conditions of Sale—Time of the Essence of the Contract—Inquiry as to Title—Waiver of Objections—Objection taken too late—Costs.

If a vendor does not deliver the abstract of title within the time specified in the conditions of sale, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the objections that time in that respect should be of the essence of the contract. In such a case, the time within which objections will be considered as waived will depend upon the general principles of the Court and the conduct of the parties.

Where a decree is made for specific performance of a contract for sale, and an inquiry is directed in general terms whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract; but if the vendor wishes to prevent objections which have been waived before the suit from being renewed under the inquiry, that point should be considered at the hearing, and noticed in the decree.

Curling v. *Austin* (1) explained.

Land was described in a contract for sale as freehold, but it was shewn by the abstract that it was formerly copyhold, and had been enfranchised under the Enfranchisement Acts. A decree was afterwards made at the suit of the vendor for specific performance, and a general inquiry directed as to title; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the Enfranchisement Acts:—

Held, that the objection was fatal to the title; but as the purchaser had taken the objection so late he was not allowed his costs.

Decision of the Master of the Rolls reversed.

THIS was an appeal from an order of the Master of the Rolls (2). The bill was filed by Messrs. *Robert Upperton* and *Robert Upperton*, Jun., for the specific performance of an agreement

(1) 2 Dr. & Sm. 129. (2) Law Rep. 10 Eq. 228.

dated the 4th of May, 1868, whereby the Plaintiffs agreed to sell and the Defendant to purchase a piece of land situate in the neighbourhood of *Brighton*, and described in the agreement as freehold.

The agreement provided (clause 2) that the vendors should, at their own expense, within twenty-one days from the date of the agreement, deliver to the purchaser or his solicitors an abstract of title to the premises.

The 6th clause provided that the purchaser should send in writing to the vendors within twenty-eight days of the delivery of the abstract all his objections and requisitions (if any) in respect of the title, and of all matters appearing on the agreement or on the abstract; and that in this respect time should be of the essence of the contract; and that in default of such objections and requisitions (if none) and subject only to such (if any) the purchaser should be deemed to have accepted the title.

The property had been conveyed in 1865 to *Philip Hedgcock*. By an indenture of the 29th of December, 1865, *Hedgcock* mortgaged the property to *C. C. P. Mair* and others, and he subsequently mortgaged it to various other persons. All these mortgages, except that of *Mair* and others, were at the date of the agreement vested in the Plaintiffs.

Previously to the agreement, namely, on the 19th of March, 1868, an agreement had been signed by *Hedgcock* by which he agreed that the Plaintiffs should have "the entire and absolute control of the property, subject to their security, as if such property were their own, and that when the said *P. Hedgcock* had done what was necessary in the judgment of the Plaintiffs to enable them to realise in his name and transfer all the property, they would release him from all his secured and unsecured debts."

Under these circumstances the Plaintiffs were practically the absolute owners of the property, subject only to the mortgage to *Mair* and others, who were clients of the Plaintiffs, and willing to act according to their wishes.

When negotiations were first entered into between the Plaintiffs and the Defendant, the Defendant treated with the Plaintiffs as acting on behalf of *Hedgcock* as the vendor of the premises, and an agreement was drawn up dated the 28th of April, 1868, between

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Hedgcock and the Defendant which was nearly identical with that subsequently made between the Plaintiffs and the Defendant. *Hedgcock*, however, did not execute this agreement, and the Plaintiffs accordingly prepared the subsequent contract of the 4th of May, 1868, by which they purported to sell to the Defendant as mortgagees.

On the 28th of July, 1868, more than two months after the date of the contract, the Plaintiffs delivered an abstract of title, which was headed, "Abstract of the title of Mr. *P. Hedgcock* and his mortgagees to a messuage called *Seafield House*, &c., formerly copyhold, now enfranchised." This abstract shewed the title of *Hedgcock* and of the first mortgagees, *Mair* and others, but did not set out the puisne mortgages, nor shew any title or interest in the Plaintiffs. The abstract disclosed the fact that the land in question was formerly copyhold, and had been enfranchised under the *Copyhold Enfranchisement Acts*, so that the mines and minerals under the soil remained the property of the lord of the manor.

On the 19th of August, 1868, the Defendant sent in his requisitions on the title. He made no objection with respect to the minerals, but inquired in the 9th requisition, in the usual form, whether there were any other incumbrances affecting the premises.

To this the Plaintiffs replied: "We will give a satisfactory reply to the 9th requisition before the purchase is completed."

On the 18th of September, 1868, the Defendant's solicitor sent a draft conveyance to the Plaintiffs for their approval, accompanied by a letter in which he said: "Subject to the requisitions on title being cleared up, I send you draft conveyance for perusal." In this draft conveyance the first mortgagees and *Hedgcock* were the only conveying parties.

On the 21st of October, 1868, the draft conveyance was returned approved. A further abstract was subsequently sent, shewing the creation of the puisne mortgages and their transfer to the Plaintiffs.

In the meantime disputes had arisen between the Plaintiffs and *Hedgcock*, in consequence of which *Hedgcock* filed a bill against the Plaintiffs for specific performance of the agreement of the 19th of March, 1868; and ultimately, on the 1st of February, 1869, a decree was made by consent to the effect that *Hedgcock* should

execute a proper conveyance, to the Plaintiffs, of his equity of redemption, the Plaintiffs indemnifying him against the mortgages on the property, and releasing all debts due to them.

Disputes subsequently arose between the Plaintiffs and the Defendant, and the Defendant refused to complete the purchase. Thereupon this suit was instituted, and a decree for specific performance was made, and it was ordered that an inquiry be made whether a good title could be made to the property. The decree contained no expressions limiting the inquiry as to title to the terms of the contract. Under the inquiry the Defendant, for the first time, took the objection that the property had been sold as freehold, whereas it was, in fact, formerly copyhold, and had been enfranchised under the *Copyhold Enfranchisement Acts*. The Chief Clerk referred the objection to the Court. The Master of the Rolls was of opinion that it was too late for the purchaser to take the objection: and from this decision the purchaser appealed.

Mr. *Jessel*, Q.C., and Mr. *Ramadge*, for the Appellant:—

The decree having directed an inquiry as to title in general terms, the purchaser is at liberty to take any objection to the title, even though it may have been previously waived: *Curling* v. *Austin* (1). The absence of special directions in the decree shews that the Court did not think the vendors entitled to them. But in the present case the purchaser had never waived any objection: for although by the terms of the contract it was stipulated that he should send in objections within twenty-eight days after the delivery of the abstract; that was dependent upon the vendor's delivering the abstract in proper time, that is, within twenty-one days. This was not done; for, in the first place, no abstract at all was delivered for nearly three months; and in the second place, when the abstract was delivered it was imperfect; it was an abstract of the title of *Hedgcock*, not of the vendors. Having broken their part of the contract as to time, the vendors cannot insist on the purchaser keeping his: *Roberts* v. *Berry* (2); *Lesturgeon* v. *Martin* (3); *Southby* v. *Hutt* (4); *Dart's* Vendors and Purchasers (5).

(1) 2 Dr. & Sm. 129.
(2) 3 D. M. & G. 284, 291.
(3) 3 My. & K. 255.
(4) 2 My. & Cr. 207.
(5) 4th Ed. p. 282.

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Mr. *Southgate*, Q.C., and Mr. *Shebbeare*, for the Plaintiffs:—

The Master of the Rolls was of opinion that the title was not the real matter of dispute between the parties; and, therefore, when he decreed specific performance of the contract he gave no special directions as to the title, which is the proper course where the contract is disputed: *Gibbins* v. *North Eastern Metropolitan Asylum District Board* (1); *Clive* v. *Beaumont* (2); *Dart's* Vendors and Purchasers (3). But whether the reference be general or special, it must have relation to the contract which is being enforced; and if a purchaser is bound by the contract not to make a particular objection, he cannot make it under the reference.

In the present case there were two stipulations as to time—one as to the delivery of the abstract; one as to the delivery of requisitions. In the first, time was not made of the essence of the contract; in the other it was. The fact, therefore, that the time was not kept in the one case is no reason why it should not be kept in the other. A perfect abstract was delivered on the 28th of July, 1868. It is true that the puisne incumbrances were not abstracted, but that did not make the abstract imperfect; the satisfaction of the incumbrances was only a question of conveyance. The vendors had the whole estate in their power, and that was sufficient: *Alexander* v. *Crosbie* (4); *Wood* v. *Machu* (5).

[They also referred to *Deverell* v. *Lord Bolton* (6), *Hobson* v. *Bell* (7), *Blacklow* v. *Laws* (8), and *Kerr* v. *Pawson* (9).]

Mr. *Ramadge*, in reply as to costs.

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the Plaintiffs have not made out a good title under the decree. The circumstances are these: The Plaintiffs entered into a contract with the Defendant for the

(1) 11 Beav. 1, 5.
(2) 1 De G. & Sm. 397.
(3) 4th Ed. p. 1023.
(4) 1 J. & Lat. 666.
(5) 5 Hare, 158.
(6) 18 Ves. 505.
(7) 2 Beav. 17.
(8) 2 Hare, 40.
(9) 25 Beav. 394.

sale to him of certain lands in *Brighton*, with the ordinary special stringent condition, that any objection to the title should be taken within twenty-eight days after the delivery of the abstract, and that any objection not so taken should be considered as waived; that time should be of the essence of the contract; and that if no objection should be taken the title should be deemed to be accepted; and if any requisitions should be made the title should be deemed to be accepted subject to such requisitions. That was the condition, there being another condition on the part of the Plaintiffs that the abstract should be delivered within twenty-one days, but without the special and stringent stipulation in it with reference to time being of the essence of the contract. The Plaintiffs were mortgagees, and the contract was one made by them in their character of mortgagees. What makes this case singular is, that there had been another contract by the mortgagor with the same Defendant as purchaser, and it was carried to the extent that the purchaser had actually signed a contract which was to be exchanged for a contract signed by the mortgagor; but there being some difficulty about that, a contract by the Plaintiffs as mortgagees was entered into—which is the contract now in question—substituting the mortgagees for the mortgagor as the vendors, but in all other respects substantially the same.

Now, no abstract was actually delivered at all for a considerable time after the twenty-one days. The contract was entered into on the 4th of May, and an abstract was delivered on the 28th of July; and the abstract so delivered does not purport to be an abstract of the title of the Plaintiffs as mortgagees—does not even contain any trace of their having any interest in the property—but is an abstract of the title of the mortgagor and of certain of his incumbrancers; that being obviously an abstract based upon and with reference to the original agreement which was talked of between the parties—an agreement with the mortgagor as vendor, and not with the mortgagees. So that there was really no delivery of an abstract of the title of the Plaintiffs. However, that abstract was delivered; and, apparently, treating it as the abstract of title of the person who was to be the vendor, the purchaser did, within twenty-eight days, take certain objections and make certain requisitions upon the title, and then he sent in

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a draft conveyance, still treating the mortgagor as the conveying party, and certain other persons—but not the Plaintiffs—as concurring with him, still dealing with it as a conveyance to be made upon the title as originally shewn. A subsequent abstract was sent, still based upon the same idea; and in truth no complete abstract of the title of the Plaintiffs as vendors—the title which they now profess to give—was ever given at all until after the suit, and until after the decree was made; because there was no abstract delivered of the agreement between the Plaintiffs and *Hedgcock*, no abstract of the suit of *Hedgcock* v. *Upperton*, no abstract of the decree of the 1st of February, 1869—all of which were essential parts of the title of the Plaintiffs as vendors under this contract. Therefore there was not a complete and perfect abstract of title delivered to the purchaser until after the institution of the suit, until after the reference as to title was made at the hearing.

But then the question arises, whether, upon the true construction of the condition, the twenty-eight days has elapsed, so that the estoppel arises. I am of opinion that that condition cannot, upon any principle of construction, be held to apply to this case. I am of opinion that there was no day before the title came to be inquired into in Chambers from which the twenty-eight days could be reckoned so as to estop the purchaser. It has been argued before us, and the language of Vice-Chancellor *Kindersley* in the case of *Curling* v. *Austin* (1) has been relied upon as going to this extent, that where there is an open reference as to title in the decree the vendor is precluded from referring to the conditions of sale, or to the contract at all, to shew that he has made a good title according to the conditions. I am of opinion that if the Vice-Chancellor's words bear that construction, it is not, and ought not, to be the rule of the Court. Whether there be any waiver otherwise is a question to be determined at the hearing; but the question whether there is a good title appears to me to mean whether there is a good title according to the contract the specific performance of which is decreed at the hearing, whether those words are in the decree or not; otherwise in every case every stipulation as to evidence, and every stipulation as to the commencement of

(1) 2 Dr. & Sm. 129.

the title, and matters of that kind, would have to be referred to specially in the decree.

I am of opinion, therefore, that in this case it must be considered as if it had been a reference as to title having regard to the contract of sale. But taking it to be a reference as to title "having regard to the contract for sale," I am still of opinion that the Plaintiffs have not, in respect of the objection that is now taken, made out a good title according to those conditions. The Lord Chancellor *Cottenham*, referring not to any particular case, but to the general practice, seems to have laid it down as a clear rule that, where there are conditions of this nature, the vendor must himself comply with the stipulation as to time before he can hold the purchaser bound by a similar stipulation. He says, in *Southby* v. *Hutt* (1): "The abstract of title was not delivered within the twenty-one days, so that no question arises as to the time specified in these conditions of sale;" and it certainly seems to me that it would be a monstrous injustice that a man who has himself not complied with the stipulation as to time should by his own act alter the date from which the time is to be calculated by the other side. It might happen that a vendor might take a most inconvenient time for delivering the abstract—as, for instance, when the purchaser's advisers were abroad during the Long Vacation. It seems to me reasonable and just that if the vendor does not himself comply with the terms specified, in that case the time for taking the objections, and the mode in which they are to be considered as waived, should depend upon the general principles of the Court. It constantly happens that an objection is waived by the conduct of the parties. A purchaser may have gone on with a knowledge of the objection, putting the vendor to expense in completing the contract, or other circumstances may have happened which may induce the Court to say that the purchaser has waived that objection. But if the waiver is put upon such equitable grounds—if it is contended that the conduct of the parties has been such that it would be inequitable to insist upon the objection—then it appears to me that the rule laid down by Vice-Chancellor *Kindersley* in *Curling* v. *Austin* (2) properly applies; that is to say, that under a general inquiry as to title the Court will not enter into any ques-

(1) 2 My. & Cr. 211.

(2) 2 Dr. & Sm. 129.

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tion whether the purchaser before suit waived any of the objections to title which he now raises. If the vendor had wished to prevent objections which had been waived before the suit from being renewed, he should have guarded himself by insisting upon a special decree based upon such waiver. In such a case, if all objections have been waived, except some which are the subject of special requisitions, there should be a special decree that the Defendant has accepted the title subject to those requisitions, and then an inquiry, for which there is a precedent given in *Seton* on Decrees (1), whether a good title can be made as to the subject of those requisitions.

That not having been done in this case, it really resolves itself into a question whether the objection now taken is a valid one. It has not been really questioned before us that, whatever may be the practical importance of the point, a man who sells land as freehold does not make a good marketable title, such as the purchaser is entitled to have, by producing a title under an Enfranchisement Act, which reserves to the lord of the manor his mineral rights in the manor. That being so, I am compelled to differ from the Master of the Rolls in the conclusion he has arrived at; but, in doing so, I am of opinion, certainly, that the Defendant is not entitled to any of the costs, even subsequent to the hearing. The objection, although he was not precluded by anything that has occurred from taking it under the reference as to title, was one which was patent on the face of the title from the very first delivery of the first portion of the abstract. He must have known, and it was well known to his legal adviser, that the land was enfranchised copyhold, but it was probably considered not of the slightest consequence at that time; and we never should have heard of the objection if it had not been for other reasons which made him an unwilling purchaser. I think, therefore, that as he was made to pay the costs of the suit for specific performance up to the hearing because he had resisted the specific performance altogether, so he is not entitled now to have the costs arising from the defect of title, which he must be taken to have known from the very earliest time in the investigation of the title. I am of opinion, therefore, that the decree of the Master of the Rolls must

(1) 3rd Ed. p. 593.

be varied. There must be a declaration that the Plaintiffs have not made out a good title; the deposit will be returned, but there will be no costs on either side.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiffs: Messrs. *Palmer, Palmer, & Ball.*
Solicitors for the Defendant: Messrs. *Burton, Yeates, & Hart.*

In re POCOCK'S POLICY.

L. JJ.
1871
May 3.

Customs Annuity and Benevolent Fund—Construction of Act—"Benefit of Children"—Settlement on Child's Marriage.

The *Customs Annuity and Benevolent Fund* was established by an Act of Parliament in the nature of an insurance fund for the benefit of the widows, children, and other relatives of officers of the Customs, who were expected to subscribe an annual sum towards it out of their salaries. By the Act directors were appointed with power to frame rules for the management of the fund, and with a discretion to admit persons other than relatives of the subscribers as their nominees to the benefit of the fund. It was also enacted that the interest of any claimant on the fund should not be assignable without the consent of the directors.

Rules were drawn up which provided, among other things, that one-third of the portion payable on the death of a subscriber should be set aside for his widow, and that the remaining two-thirds, or the whole, if he left no widow, "should be applied or paid in any manner or proportion which he might propose for the benefit of his widow, children, or relatives, or his nominees who should have been duly admitted by the directors."

A subscriber, who was a widower on the marriage of his daughter, appointed his share of the fund to the trustees of her marriage settlement, and directed the trusts to be for his daughter for life, with remainder for her husband for life, with remainder for their issue. He afterwards sent in the names of the trustees as his nominees for admission by the directors; but neither they nor the husband were formally admitted. The daughter died in her father's lifetime, and on the death of the father without having been again married, the directors paid his share of the fund into Court under the *Trustee Relief Act.* The husband presented a Petition for payment of the fund to the trustees of the settlement:—

Held, by *Malins,* V.C., that the trustees were the proper persons to be admitted as nominees, and that, as the directors had not objected to admit them, they must be held to have been sufficiently admitted for all purposes.

Held, on appeal, by the Lords Justices, that the settlement on the daughter,

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her husband and issue, was a valid application of the fund "for the benefit of his daughter" within the meaning of the rules, and that no admission of the trustees or the husband as nominees, nor any consent by the directors to the settlement, was necessary.

Order of *Malins*, V.C., affirmed.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

Mr. *Pocock* was a subscriber to the *Customs Annuity and Benevolent Fund*, which was established by the 56 Geo. 3, c. lxxiii. (local). By that Act a fund was constituted in the nature of an insurance fund, to which each officer in the Customs is expected to subscribe a certain sum annually.

The preamble of the Act recited that the establishment and regulation of a fund for the conditional benefit and relief of the widows and children, or other relatives of the established officers, clerks, and other persons employed in the department of the Customs in *England*, would be highly beneficial.

The Act appointed a body of directors for holding and managing the fund, and gave them power to make rules for the regulation of the fund.

By the 9th section of the Act it was provided, "That the said directors shall and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber; and the said nominee or nominees so admitted as aforesaid shall and are truly declared to have, and thereafter to continue to have, to all intents and purposes, the same and the like interest in the said fund, and the advantages thereof, as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

The 11th section was as follows: "And in order to insure to the widows of the subscribers, or any other claimants on the said fund, the full benefit intended by this Act as an alimentary provision for the widows or other claimants entitled thereto; be it further enacted, that no annuity or sum of money payable to any widow or other claimant under any of the provisions of this Act shall be assignable, except with the permission and approbation of the said directors, or any three or more of them, or liable to be affected

by arrestment, or otherwise attachable by any creditor, or be subject to the *jus mariti* of any husband with whom any such widow or other claimant may intermarry, or be subject in any manner to any debts or deeds or contract of any such husband, but the same shall be paid to such widow or other claimant entitled thereto, upon her own receipt only, notwithstanding such arrestment, attachment, or marriage."

Rules were drawn up in accordance with the Act, regulating the rate of subscription to be paid by members and the mode of application of the fund.

Rule 1 was as follows: "The *Customs Annuity and Benevolent Fund* shall be raised by subscription upon the principle of life insurance, and, together with the contribution of poundage granted by the aforesaid Act, shall form a fund for the widows, children, and relatives and nominees of officers or persons belonging to the department of Customs in *England*, and the admission by the directors of a nominee or nominees of subscribers under the said Act shall, as to the person of such nominee or nominees, take place during the lifetime of such subscriber. And any such admission may from time to time be revoked and annulled by the subscriber at his will and pleasure, or by the directors at their discretion, where they shall have just cause to believe that such admission has been procured in fraud of the principle and policy of the fund. Every nominee of a subscriber shall be entitled to such proportion only of his insurance in the fund as shall be limited and directed by such subscriber in conformity with these regulations."

Rule 12 provided "that the capital money forthcoming at a subscriber's death shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing signed by him in the presence of an attesting witness, and deposited with the directors during his life, or deposited within three months after his death, and which instrument may, at the option of each subscriber, be made absolutely irrevocable, or in default of any such directions, in manner hereinafter provided."

It was provided by the same rule "that one-third part of the said capital money shall be set aside as the widow's portion, and shall be appropriated in the creation of an annuity for her benefit, and the

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remaining two-thirds of such capital money shall be subject to the directions of the subscriber under these regulations, and shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or of his nominee or nominees who shall have been duly admitted by the directors."

The same rule also provided that, "if there be no widow, or if the widow be excluded from all benefit of the fund on account of misconduct, the whole capital money forthcoming shall be subject to the directions of the subscriber as aforesaid. When a subscriber shall not by will or such other instrument as aforesaid have directed the application of the capital money herein placed at his disposal, excepting as aforesaid, the same shall become the property in equal proportions of his child or children living at his death, and of the child or children or other issue then living of such of his children (if any) as shall have died in his lifetime, such grandchildren or other issue nevertheless to be only entitled to the share which his, her, or their respective parent or ancestor would have taken, if living, at the death of such subscriber."

On the 23rd of May, 1860, Mr. *Pocock*, who was then a widower, made a settlement of the whole of his insurance fund on the marriage of his daughter, who was a party to the deed, with *H. C. Cobbold*, whereby he appointed the two trustees of the settlement nominees of his interest in the fund, and declared the trusts to be for his daughter for life for her separate use, and after her death for her husband *H. C. Cobbold* for his life, and after the death of the survivor, for the children of the marriage, with ultimate trusts in favour of the daughter absolutely.

On the 11th of August, 1860, Mr. *Pocock* executed an instrument in the form prescribed by the rules, by which he directed that the fund should be paid to the two trustees of the settlement. This document was forwarded to the directors by *H. C. Cobbold* on the 22nd of September, 1860.

In reply, the secretary wrote to *H. C. Cobbold* a letter of the 25th of September, which was as follows:—"We have received the directions of Mr. *Pocock* forwarded in your letter of the 22nd instant; and if the trusts of the marriage settlement provide that the insurance of Mr. *Pocock* should be paid over to the trustees for the sole benefit of his daughter, or for the benefit of her issue, the

directions in that case would be in strict conformity with the rules; but should the appointment go to the payment of the money over to the husband in the event of the decease of his wife, and if her death should happen before that of her father, we think a difficulty would arise, to obviate which we would advise Mr. *Pocock* to write to the directors to admit his son-in-law, Mr. *H. C. Cobbold*, his nominee for the purpose of the marriage settlement." Mr. *Pocock*, however, took no further step in the matter.

Mrs. *Cobbold* died in April, 1867, intestate, leaving one child.

Mr. *Pocock* died on the 24th of January, 1870, without having been again married, and leaving an only son, *C. M. Pocock*.

A copy of the settlement was deposited with the directors within three months after Mr. *Pocock's* death. The directors paid the money, which now amounted, with bonuses, to £5569, into Court under the *Trustee Relief Act*.

H. C. Cobbold presented a Petition for the payment of the fund to the trustees for the purposes of the settlement. *C. M. Pocock*, the son of Mr. *Pocock*, opposed the Petition, on the ground that the Petitioner ought to have been admitted by the directors, and that, as he had not been so admitted, his life estate in the fund was void, and went in equal moieties to the son of Mr. *Pocock* and the child of Mrs. *Cobbold*.

The Vice-Chancellor held that the trustees were the proper persons to be admitted, and that they must be held to have been sufficiently admitted for all purposes. He accordingly granted the prayer of the Petition (1). From this decision *C. M. Pocock* appealed.

(1) 1871. Jan. 23. W.N. 18/19.

SIR R. MALINS, V.C., after referring to the Act of Parliament and the rules, and to the instrument of the 11th of August, 1860, continued:—

Now this document having been served on the directors, the next question is, what is the meaning of "admission?" The form of "nomination" is given, but no form of "admission." I take it, then, to be perfectly plain that "admitting" means "not objecting," and that when the directors have a form of nomination served upon them they have a veto; just as in some joint stock companies the directors have a veto on transfers by shareholders of their shares. The law is thoroughly settled that in such a case directors must allow the transfer unless they shew it to be objectionable, and their power must be exercised on reasonable grounds and without delay. But the argument in this case was attempted to be carried to the extent that, because the directors did not give express assent

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Mr. *Pearson*, Q.C., and Mr. *Bagshawe* (Sir *Roundell Palmer*, Q.C., with them), for the Appellant:—

The subscribers to this fund have no property in it, and can only

during the lifetime of Mr. *Pocock*, who lived ten years after the nomination, objections may now be raised on the ground of non-performance of that ministerial act. The directors have only one object, to perform their duty; and I beg to tell the principal officer connected with the fund, who I am glad to see in Court, as my ruling on the subject, that in all future transactions with this fund it is important that those who deal with them should not be betrayed into any mistake, or be liable to have an objection raised against their nominee after having been allowed to believe that their nomination was quite proper. It is the imperative duty of the managers, after receiving a notice of nomination, if they intend to raise any objection, to give the earliest possible notice of it in distinct terms, that it may be set right if possible. No objection having been raised in this case, it is clear that Mr. *Pocock* had the right to nominate any one he thought fit.

I totally dissent from the argument of Mr. *Pearson*, that no person can be a nominee except one who is to take beneficially. It would be repugnant to every principle of justice to lay down such a rule as that. Where a subscriber has children who are infants, or if adults incapable of taking care of themselves, it is most proper that he should nominate trustees to hold on their behalf. I am distinctly of opinion that, under the 12th rule, the subscriber is at liberty to nominate any stranger whatever, and all the duty imposed on the directors is to see that the purpose for which nomination is made is not, as the first clause of the rule says, such an admission as "has been procured in fraud of the principle and policy of the fund." The principle and policy of the fund no doubt is to provide for the families of the subscribers, and if a subscriber were to make a nomination to creditors by way of security, it would be competent for them to say that it was a fraud upon the principle and policy of the fund, and that they objected to it. But even in that case it is their duty to object forthwith, and not to lie by and raise objections when the only person who can set it right is dead. I think that the directors must be taken to admit, if they do not object.

[His Honour then considered the correspondence, and held that the directors had, in fact, acquiesced in the admission of the trustees, and continued:—]

I have been referred to a decision of the Court of Exchequer arising upon the rights of subscribers to this fund. I refer to the case of *Attorney-General* v. *Rowsell* (cited in *Tilsley's* Treatise on the *Stamp Acts*, 2nd Ed. p. 685), which was decided in 1844, in which a subscriber died after having nominated his brother, and it was sought to make the fund liable to legacy duty. It was argued that it was property derived through the bounty of the subscriber, and liable to duty like other property. But it was decided that it was not liable to legacy duty, because, as Lord *Cranworth* expressed it, "It is quite clear to me that this is neither personal estate, nor a fund over which he has anything else than a limited and special control." I take, therefore, for the purpose of my decision, the fund to be very much like one over which a

direct its application strictly according to the Act and the rules. This was decided in *Attorney-General* v. *Rowsell* (1). A subscriber may, without the consent of the directors, appoint it, subject to his widow's interest, to his children or other relatives in which his son-in-law is not included. But he cannot appoint it to any one who is not a relative without such nominee being admitted by the directors. It is also clear that these nominees must be persons beneficially interested, and not mere trustees, otherwise the whole objects of the scheme would be defeated, and the directors would lose all control over the application of the fund. In the present case the trustees were never formally admitted, for no resolution of the directors to that effect has been proved; but even if they

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particular person has a special power of appointment to his children, or to any descendant of his children, and which, in default of appointment, goes over. Mr. *Pocock* had complete control over this fund, except that it does not seem to be admitted that he could appoint it for the benefit of creditors, for nomination is equivalent to appointment. He has nominated or appointed these two trustees to take it, and they cannot take for their own benefit.

Two cases have been commented upon, *Thornton* v. *Bright* (2 My. & Cr. 230) and *Fowler* v. *Cohn* (21 Beav. 360), which appear to me to have a most material bearing upon this case. Those cases decide that where *A.* has a power of appointing real estate amongst his children, it is perfectly clear that in a Court of Law, if he appoints to any other persons than his children, the appointment is void. But in *Thornton* v. *Bright*, Lord *Cottenham* decided that where a donee of a power appoints the estate to trustees in trust for the objects of the power, that, in a Court of Equity, is perfectly valid. In *Fowler* v. *Cohn* the donee of a power of appointing an estate amongst his children appointed trustees, and directed them to sell the estate and divide the money amongst the children. That the Master of the Rolls held to be valid in equity, though it would have been invalid at law.

This gentleman, therefore, having the power to nominate any person he thought fit, nominates or appoints the fund to the trustees of his daughter's marriage settlement, the trusts of which were for the daughter for life, then for the husband for life, and then for the children. If he had appointed, as he might have done, to the daughter, the son-in-law, and the grandchildren themselves, why should he not be at liberty, as in *Thornton* v. *Bright* and *Fowler* v. *Cohn*, to appoint to trustees for them? He has, in my opinion, made a complete valid and binding appointment in favour of these trustees, and to them the directors were bound to pay the fund; the son-in-law, Mr. *Cobbold*, under the settlement, is within the object of the power. In my opinion, the objection made to his title is wholly unsustainable, and one which has not a particle of principle, honesty, or anything of the sort in it, and I am sorry Mr. *Pocock*, the son, has thought fit to raise it.

(1) Ex. 1844, cited in *Tilsley's* Treatise on the *Stamp Acts*, 2nd Ed. p. 685.

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had been, their admission would not have been sufficient without the admission of Mr. *Cobbold,* who was the person beneficially interested.

It has been attempted to support this appointment as an appointment to the daughter, and a settlement with her consent, upon the authority of *White* v. *St. Barbe* (1) and similar cases; but those cases are based upon the power of the appointee to deal with the fund after it has been appointed to her, and do not apply here, as the appointee is prevented by the rules from alienating without the consent of the directors. We therefore contend that the appointment of a life interest to the husband was void.

Mr. *Cotton,* Q.C., and Mr. *Cozens-Hardy,* for the Petitioner, were not called on.

Mr. *Glasse,* Q.C., and Mr. *Lindley,* for the directors of the fund, took no part in the argument.

Sir W. M. James, L.J.:—

I am of opinion that the order of the Vice-Chancellor must stand, although not exactly on the same grounds as those on which the Vice-Chancellor has put it. The view which I take of the matter appears to me quite consistent with every word of the Act of Parliament and of the rules of the society. It must be borne in mind that the person who has the right to deal with this money is the person who has himself contributed to the formation of the fund. He has, out of his own annual income, accumulated in this fund a certain amount of property which would be his to dispose of in any way he thought fit, except so far as he is restrained from that disposition by the words of the rules or the plain intent and meaning of the Act of Parliament. The Act of Parliament shews that it was intended to be a provision for widows and children, for relatives, and for the benefit of persons who come under neither class, but who are persons to be let in, with the consent and approbation of the directors, to an interest in the funds.

But, then, it is said that the following clause in the 12th rule

(1) 1 V. & B. 399.

governs this case. After dealing with the two-thirds which are to be left to the widow, that rule provides that "the remaining two-thirds of such capital money shall be subject to the directions of the subscriber under these regulations, and shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or of his nominee or nominees who shall have been duly admitted by the directors." I cannot bring myself to doubt that a father having this fund to apply to the benefit of his children—there being no words shewing an intention to limit the benefit to persons living at his death—may apply it for the benefit of his child, although that child might afterwards die during his life. That this gentleman has done; he has made this provision *bonâ fide* for his daughter's benefit by procuring for her a marriage and a marriage settlement. It seems to me to be the best way in which he could deal with it for her benefit, and it is a manner of applying it for her benefit honestly adopted by him, and in no way inconsistent with the authority of the cases on the subject, of the Act of Parliament, or of the rules. If it were necessary to cite authorities, it would be sufficient to rely upon *White* v. *St. Barbe* (1), where the settlement was made in exactly the same way as in this case, not in the form of an appointment and a subsequent settlement, but of an appointment and settlement on the child's marriage for the benefit of herself and her husband and issue. It is, however, said that in that view of the case the restriction imposed by the 11th section of the Act would prevent the daughter from herself assigning the fund, and therefore the settlement would not bind her. But the appointment would, notwithstanding, be perfectly good, and the husband would take the fund after his wife's death as her administrator. The settlement would be binding on him, although, if the daughter had survived her father, she might have said that it did not bind her.

But I do not insist on that view of the case, for I am perfectly satisfied that it is within those words, "for the benefit of the child or children," and I do not think we ought to be too astute in finding restrictions which are not expressly stated to prevent a man dealing with a fund, which he has accumulated himself during his lifetime out of his own savings, for the benefit of his own family.

(1) 1 V. & B. 399.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. It seems to me that the whole object of the father in dealing with the fund was to do something for the benefit of his daughter. The settlement was made with that object, for it is executed "in consideration of the natural love and affection he had for his daughter." That being so, an appointment is made to the husband. I suppose that this was part of the marriage contract. He procured her a husband, and he agreed to settle the money in this way. The first question, therefore, is, Had he power to do that? The words of the 12th rule are these: "And the remaining two-thirds" (and there being no widow, it is to be read as the whole) "of such capital money shall be subject to the directions of the subscriber under these regulations, and shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives." The words "applied or paid" are a modification of the words in the Act, where the fund is directed to be "paid to the widow or other claimant entitled thereto." Then is not this an application of the money for the benefit of this particular child? It appears to me that it is so; and it being admitted that the settlement was sent after the death of the subscriber to the directors, I am of opinion that all was done that was necessary, and that this was a good appointment. The appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Palmer, Eland, & Nettleship.*
Solicitors for the Petitioners: Messrs. *Sharpe, Parker, & Co.*
Solicitor for the Customs Fund: Mr. *J. Elliott Fox.*

Ex parte JOINT STOCK DISCOUNT COMPANY.
In re DAUNT.

L. JJ.
1871
Feb. 25;
March 25.

Bankruptcy Act, 1861, *s.* 197—*Creditors' Deed—Proof of Debts.*

8 Ch 715

The drawer of a bill of exchange made, in 1866, a deed of arrangement with his creditors. The bill had been indorsed to the *B. Company*, and by the *B. Company* to the *D. Company*, and then by the *D. Company* to *L. C. L. C.* proved against the estates of the *B. Company* and the *D. Company*, which were being wound up, and received dividends from both, leaving only a small sum due. The liquidator of the *D. Company* paid the remainder, took up the bill, and applied under the drawer's deed of arrangement for a dividend on the whole amount of the bill:—

Held (affirming the decision of the County Court Judge of *Liverpool*), that according to the true construction of the *Bankruptcy Act*, 1861, s. 197, creditors are not, for the purpose of ascertaining the dividend to which they are entitled, to be treated as having proved at the time of the registration of the deed, but at the time when they go in to make their claims against the estate; and that the liquidator, therefore, was not entitled to a dividend on the whole amount of the bill, but only for what the *D. Company* had paid upon it.

THIS was an appeal by the *Joint Stock Discount Company, Limited*, from a decision of the Judge of the County Court of *Liverpool*, ordering the inspectors of *Daunt & Co.* to pay them a dividend of 6*d.* in the pound on £5476 only, and not on £9466.

W. H. Daunt traded under the firm of *Daunt & Co.*, and he drew five bills of exchange, for sums amounting to £9466, on different persons, falling due respectively on the 13th and 18th of May, and the 2nd, 14th, and 18th of June, 1866. These bills were indorsed by *Daunt* to *Barned's Banking Company*, by whom they were indorsed to the *Joint Stock Discount Company*, and again, before maturity, were indorsed by the *Joint Stock Discount Company*, two of them to the *London and County Bank*, and the others to the *Wilts and Dorset Bank*, *Overend, Gurney, & Co.*, and *Gurneys, Birkbeck, & Co.*, respectively.

On the 17th of March, 1866, an order was made for winding up the *Joint Stock Discount Company*; *Barned's Banking Company* was also ordered to be wound up some time after the indorsement of the bills.

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On the 25th of May, 1866, *Daunt* executed a deed of arrangement with his creditors, which was registered under sect. 192 of the *Bankruptcy Act*, 1861. This deed was expressed to be made between *Daunt* of the first part, certain inspectors of the second part, and the several persons, &c., "who at the date hereof are respectively creditors of the said debtor, or who would be entitled to prove under an adjudication of bankruptcy against the said debtor on a Petition filed on the day of the date of these presents," of the third part; and it provided that the estate should be administered according to the principles of the then bankrupt law, or as near thereto as circumstances would permit, having regard to the terms of the deed; and that until such full payment and satisfaction as thereinafter mentioned all moneys to arise from the estate of the debtor should be applied in like manner as under an adjudication of bankruptcy against the debtor, in paying such costs, rent, &c., as therein mentioned, and in paying such dividends upon the several debts, claims, or demands of the creditors respectively as would have been and become payable out of such and so much of the said moneys as would have been or become applicable thereto according to the law of bankruptcy in case the debtor had "on the day of the date of these presents been adjudicated a bankrupt," until full payment thereof respectively. It was further provided, that each of the creditors respectively, before becoming entitled to receive any dividends, should, if reasonably requested by the inspectors, deliver to them a statement in writing, signed by him, of his debt, with all particulars necessary or usual in a proof in bankruptcy; but that no such statement, nor the execution of the deed by any creditor, should be conclusive evidence of the validity or amount of his claim. It was further provided that where any persons had received from the debtor negotiable instruments drawn, accepted, or indorsed by him, which had been negotiated and were then in the hands of third parties, then the original holders and the present holders, as well as any intermediate indorsers, might be admitted to execute the deed; but that the ultimate real holder for value should be deemed the creditor; and the execution by the other parties to such negotiable instruments should be considered only as evidence of their assent to the ultimate holder having the benefit of the deed with respect to them.

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At the times of the winding-up order and of *Daunt's* arrangement deed two of the bills in question were held by the *London and County Bank*, and the others by the *Wilts and Dorset Bank*, *Overend, Gurney, & Co.*, and *Gurneys, Birkbeck, & Co.*, respectively. The holders proved against the estates of the *Joint Stock Discount Company*, and of *Barned's Banking Company*. Dividends were paid by these estates, the *Joint Stock Discount Company* paying a considerable dividend on them. The acceptors were, in fact, insolvent, though they had not become bankrupt, and nothing was to be looked for from them.

On the 25th of March, 1869, there remained due to the *London and County Bank* on their two bills £368, which, on the 8th of June, 1869, the official liquidator of the *Joint Stock Discount Company* paid to them, and the two bills were handed over to him. *Overend, Gurney, & Co.* had become holders of another of the bills besides the one which they previously held. These bills were paid in full by payments from the estate of the *Joint Stock Discount Company* and the other parties liable, and were handed over to the official liquidator. In October, 1869, the *Wilts and Dorset Bank* handed over their bill to the official liquidator on the understanding that he would pay the balance of £22 which remained due on it. In October, 1869, the inspectors under *Daunt's* deed having made it known that they were prepared to pay a dividend of 6*d.* in the pound on his debts, the liquidator of the *Joint Stock Discount Company* sent in a claim for the whole amount of the bills, viz., £9466. The inspectors replied, denying all liability; whereupon the liquidator of the *Joint Stock Discount Company*, in the name of the company, applied in bankruptcy for an order on the inspectors to pay the dividend.

The Judge of the County Court held, that the *Joint Stock Discount Company* were entitled to a dividend from *Daunt's* estate in respect of whatever they had paid on the bills, whether by way of dividend, or by way of payment to obtain possession of the bills, but not in respect of anything more. The amount of what had thus been paid was computed by the Registrar at £5276, the remaining £4190 having come out of the estates of other parties to the bills.

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Mr. *Winslow*, for the official liquidator of the *Joint Stock Discount Company*:—

The persons who held the bills are the creditors: *Ex parte Petrie* (1). Sect. 197 of the *Bankruptcy Act*, 1861, defines the position of creditors under the deed. They are in the same position as if they had proved. The *London and County Bank*, as holders of two of the bills at the time, therefore had, in respect of those bills, the same rights as if they had proved.

[The LORD JUSTICE MELLISH:—Do the authorities settle this question: If the holder proves against the drawer, and then the acceptor pays 10*s.* in the pound, can the holder receive dividends on the whole amount?]

Byles on Bills (2); Bankruptcy Act, 1849, s. 173; *Ex parte Holmes* (3); *Ex parte Stokes* (4); *Ex parte Douthat* (5).

Mr. *Little*, Q.C., and Mr. *North*, *contrà*:—

The frame of the deed quite displaces the argument of the Appellant, for it contains a provision requiring creditors to establish their debts to the satisfaction of the trustees.

[The LORD JUSTICE MELLISH:—If the Act says that all the creditors are to be in the position of creditors who have proved in bankruptcy, can the deed alter that?]

We submit that it can. A creditor who comes in under a deed must take the deed as he finds it, and a clause of this nature has been decided to be a legal clause. The Act did not intend to put the creditors wholly in the same position as that of creditors proving in bankruptcy. The law of bankruptcy cannot be intended wholly to apply, for the deed may direct distribution in a way quite different from that in bankruptcy, as in *Walker* v. *Nevill* (6). Under a deed the time of sending in the claim is, for the purposes of dividend, equivalent to proof: *Ex parte Petrie*; *In re Kelson* (7); *Ex parte Maxoudoff* (8). The person who pays

(1) Law Rep. 3 Ch. 232.
(2) 10th Ed. p. 455.
(3) 3 Deac. 662.
(4) De G. 618.
(5) 4 B. & A. 67.
(6) 3 H. & C. 403.
(7) Law Rep. 4 Ch. 125.
(8) Ibid. 6 Eq. 582.

stands in the shoes of a person who has proved: *Ex parte Wildman* (1); *Ex parte Royal Bank of Scotland* (2); *Ex parte Tayler* (3); but here no one has proved. The Appellant comes in for the first time to prove on a part-paid bill.

Mr. *Winslow*, in reply.

SIR W. M. JAMES, L.J.:—

I think that, although the circumstances of *In re Kelson* (4) were somewhat different from those of the present case, we are bound by the decision of Lord *Cairns* as that of a Court of co-ordinate jurisdiction. To my mind, he clearly considered that there was to be under these deeds something analogous to proof, and that the time at which the claim was made was to be considered as the time of proof. In the analogous case under the *Companies Act*, if a creditor has not received any part of his debt before he goes in to prove it, then he proves for the whole amount without deducting securities; if he has received something at the time he sends in his claim, then he only proves for the balance after deducting what he has received. It appears to me reasonably clear that the first part of this section cannot have the extensive (indeed, I may say, the universal) operation which it has been sought to attribute to it; for if that be the true construction, then the Legislature has used about forty lines to express that which might have been expressed in a few words, to this effect: "From and after the registration of every such deed or instrument in manner aforesaid the debtor and creditors and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall, in all matters relating to the debtor, be in the same position as if the debtor had been adjudicated a bankrupt, the creditor had proved, and the trustees had been appointed assignees under such bankruptcy." That would have been the short way of expressing the intention that matters should be in the same position in all respects as if the debtor had been a bankrupt, and the creditors had proved at the date of the registration of the deed, and the assignees had been appointed. It appears to me that that was not the intention

(1) 1 Atk. 109.
(2) 2 Rose, 197.
(3) 1 De G. & J. 302.
(4) Law Rep. 4 Ch. 125.

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of the Legislature; for, had it been, they need not have gone on with the provision which they make in the subsequent part of that clause, where they deal, as it appears to me, expressly with the distribution of the estate, and with the respective and relative rights of the different creditors as between themselves: "And the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed, or may be used or exercised, by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy." Then there is a clause that, "except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." That deals with all questions as to the right of creditors to dividends, and the amounts for which their proofs are to be made. What, then, is the meaning of the first clause? It seems to me that, looking at the context, it means this only, that the rights and liabilities of the debtor, creditors, and trustees connected with their *status* of debtor, creditors, and trustees, are to be the same as in bankruptcy, and that it has nothing to do with the amount of debt, or the time of proof, or what dividends the creditors are to receive. All things which relate to the *status* of the parties having been provided for by the first part of the section, the second part, according to my view, provides for how the estate is to be dealt with, which it does by enacting that it shall be dealt with according to the rules of bankruptcy, or as near thereto as circumstances will admit, or, in other words, by analogy thereto. The analogy which appears to me to govern the case is, that the time when a man goes in to make the claim which he can and ought to be called upon by the trustees to make, is the time at which the amount for which he is to be admitted a creditor is to be ascertained. That appears to me to

be the true analogy between a trust deed and a bankruptcy. I am, therefore, of opinion that the decision of the County Court Judge is right.

SIR G. MELLISH, L.J.:—

I agree, as I think that in the case of *In re Kelson* (1) Lord *Cairns* practically decided that under a deed framed like this a creditor is not placed in the same position as if he had proved in bankruptcy until he has claimed the amount and proved it to the satisfaction of the trustees. If, however, the case had come before me untouched by authority, I should have been disposed to hold the true construction of the Act to be, that the Legislature considered what takes place before a deed is registered to be tantamount to proof, because, under the 192nd section, "A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to £10 and upwards, shall, before or after the execution thereof by the debtor" (that must be before it is registered), "in writing assent to, or approve of, such deed or instrument." Then the deed, after it has been stamped, is to be produced and left at the office of the Chief Registrar for the purpose of being registered. Then the statute says, that there is to be an affidavit stating that three-fourths in value of the creditors have assented, and stating the amount in value of the property and credits of the debtor comprised in such deed. If a mistake were made, it would be corrected when the Court came to wind up the estate; but, *primâ facie*, the amount for which a person was permitted to execute the deed by the trustees is considered as settling the amount of his debt. That idea is carried on also in the 5th clause of the 192nd section, which says: "Together with such deed or instrument there shall be delivered to the Chief Registrar an affidavit by the debtor, or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amount to £10 or upwards, have in writing assented to, or approved of, such deed or instrument." Therefore it assumes that

(1) Law Rep. 4 Ch. 125.

L. JJ. 1871 *Ex parte* Joint Stock Discount Co. *In re* Daunt.

the trustees of the deed have discovered, or taken means to find out, who are the creditors, and have found out the value of their debts, because, even with the dissenting creditors, they must certify that a majority in number, representing three-fourths in value, have assented. I should have been disposed to think that when the 197th section refers to the creditors as having proved, what it means is, that the creditors are to be treated as having been *primâ facie* ascertained, and their debts proved, though not ascertained or proved conclusively, so as to preclude the requiring further proof, or the striking a man's name out of the list if he is found not to be a creditor, or the correction of any other mistake that has been made. As, however, Lord *Cairns* has decided the contrary, and the Lord Justice is of opinion that that decision is correct, the judgment in this case will be affirmed.

Solicitors: Messrs. *Lawrance, Plews, & Co.; W. W. Wynne.*

L. JJ. 1871 *March* 10.

In re LUNDY GRANITE COMPANY. *Ex parte* HEAVAN.

Company—Winding-up—Rent—Distress—Companies Act, 1862, *ss.* 87, 163.

Where a company, being equitable owner of a lease, continues after a winding-up order in the occupation of the leaseholds, and leaves goods upon the land, the landlord is not, by sect. 87 or sect. 163 of the *Companies Act*, 1862, prevented from distraining upon the goods of the company for rent accrued since the winding-up.

Orders of the Master of the Rolls discharged.

In August, 1863, Mr. *H. Heavan* demised to Mr. *McKenna*, *Lundy Island* for seven or fourteen years, at the yearly rent of £700. Shortly afterwards *McKenna* agreed to assign the lease to the *Lundy Granite Company, Limited*, and the company took possession of the island, and continued in possession. On the 19th of November, 1868, an order for winding up the company was made. The official liquidator did not remove the goods of the company from the island, and paid the rent to Mr. *Heavan* up to the 24th of June, 1869, but apparently for *McKenna*, and Mr. *Heavan* seemed

not to have recognised the company as tenants. Some negotiations took place between the official liquidator, *McKenna*, and Mr. *Heavan*, and some proceedings in Chambers as to a surrender of the lease, and the grant of a new lease to one *Benthall*, which, however, had no result. There was a considerable amount of property on the island belonging to the company, and the official liquidator proposed to sell this and the other property of the company; whereupon Mr. *Heavan*, having previously applied to *McKenna* for the rent, distrained for the rent due to the 25th of December, 1870, *McKenna* being named in the warrant as the tenant. The property taken under the distress belonged to the company, and the Master of the Rolls, on the 23rd of February, 1871, made an order in the winding-up restraining Mr. *Heavan* from proceeding. Mr. *Heavan* then moved for leave to proceed, which was refused by the Master of the Rolls (1).

(1) 1871. March 6.

LORD ROMILLY, M.R.:—

This is an application by the proprietor of *Lundy Island* for leave to issue a distress upon certain goods of the company which are upon *Lundy Island* for payment of rent which is admitted to be due to him.

The property on which the proprietor of the island wishes to distrain belongs to the company, but it happens to be on land which is leased to another person. The company are not carrying on business, or doing anything which would in any shape make them liable to pay rent, so that there is no debt due from them to the proprietor; but there is property of theirs which is upon the land that is demised, upon which property the landlord, according to the ordinary law of *England*, unless it is modified by the statutes relating to joint stock companies, is entitled to distrain. The question in this case is, whether he is entitled to distrain upon those goods.

In the first place, one very important distinction arises in this case. The distress was put in, or was asked to be put in, which is the same thing, subsequently to the winding-up order. Therefore the cases in which the Court has held that where an execution issues, or the goods are taken, before the winding-up order is made, the Court will not interfere, do not apply.

Then, how is Mr. *Heavan* affected by the Act of Parliament? There are two sections on the subject which are very plain and clear. The first is the 163rd section, which is to this effect: "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." Without raising any question whether "being wound up" means before the order or not, it is quite clear that it applies after the winding-up order, and this section says distinctly that the distress "shall be void to all intents." The result is, that if that section stood alone the distress cannot be levied. It does not say a distress in respect of any rent due, or

L. JJ.

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In re LUNDY GRANITE CO.

Ex parte HEAVAN.

Mr. *Heavan* appealed from both the orders.

Mr. *Roxburgh*, Q.C., and Mr. *Badcock*, for the Appellant:—

Sections 163 and 164 of the *Companies Act*, 1862, on which the

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anything of that description, but a distress upon the goods of the company.

But this section is to be taken in conjunction with the 87th section, which is to this effect: "When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose." Now, it is quite clear that a distress is a proceeding against the goods of the company, because, if this section does not apply, the other section makes it absolutely void. Therefore the Court may give leave, and also impose such terms as it thinks fit. I am of opinion that the Court has clear jurisdiction to do what it thinks right in this matter. I hold it to be quite clear and certain, that, assuming that the company was the lessee of the applicant, then the Court would stop the distress, and allow the applicant to prove for the amount of rent against the company. That, in fact, was done by me in a previous case. I do not understand that it has been objected to, and I believe that it has always been followed.

Mr. *Roxburgh*, who argued this case with great ingenuity and ability, said that it did not apply to this case, because Mr. *Heavan* was not a creditor of the company, and could not prove at all in the winding-up. Technically, that may be correct; but, substantially, I do not think it has any weight, because this applicant has a species of lien, according to the English law, unless taken away by this statute, against certain goods of the company, and the Court has the power of saying that he shall not levy a distress upon these goods of the company, or, if he does, he shall levy it upon such terms and conditions as the Court shall direct.

I am of opinion that the whole of the principle of this Act, and the reason of these sections, was not to prevent a person from recovering his proper debt against the company, or his proper claim against the company, but to put everybody who had claims upon the company upon an equal footing. It so happens, from the peculiarity of the English law, that a person can distrain upon the goods of the company which happen to be upon the lands of the lessee, though the landlord is, strictly speaking, not a creditor of the company. Yet I am of opinion that he is, for all intents and purposes under this Act, to be treated as in exactly the same situation—that he ought to be put *pari passu* with all those persons who have any claims upon the company; that he ought not to have any particular or exclusive preference or advantage by reason of the circumstance that he has only incidentally by law a claim upon the property of the company without being a creditor of the company, and that he ought to be put in the same situation as if it were the property of the company. Therefore I am of opinion that the proper order to make on this motion is to say that the distress shall not issue, but that Mr. *Heavan* shall be at liberty to prove against the company, not as a creditor, but merely to prove to this amount against the company, and that he is to be entitled to receive a

Master of the Rolls went, apply only to creditors of the company. If the landlord was a creditor of the company it would be different, as appears from sect. 87, but he is not; he has nothing to do with the company, and is only proceeding to recover his rent. The statute cannot have been intended to take away the common law rights of the landlord, and to leave him without a remedy: *In re Exhall Coal Mining Company* (1); *In re Progress Assurance Company* (2).

Mr. *Swanston*, Q.C., and the Hon. *E. Romilly*, for the official liquidator:—

There had been negotiations between Mr. *Heavan* and the official liquidator for the surrender of the lease, and Mr. *Heavan* knew that the goods belonged to the company. There is no case in which the Court has given leave to a creditor where proceedings had not been begun before the winding-up. The whole scope of the Act is, that creditors shall be put upon an equal footing, and that no one shall be allowed to avail himself of any special rights. This is clearly a distress on the goods of the company, and as such is void under sect. 163; nor is it a case where leave to proceed ought to be given. It makes no difference that the company is not the lessee, as the goods belong to the company, and are protected. The Act could not have intended to place the company in a worse position as lessee than as under-lessee. If there had been a lien on the goods before the winding-up, of course it must have been discharged, but this rent has accrued since.

SIR W. M. JAMES, L.J.:—

My opinion is, that the appeal in this case is well founded, and that the orders of the Master of the Rolls cannot stand. Before we consider the application of the 163rd section to distress against a lessee, the goods being on the property, and liable, it may be expedient to consider how it would have been if the case had been

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dividend *pari passu* with all the creditors of the company. I think, also, having regard to all the circumstances of this case, that he ought to add his costs of this application to his proof, and prove the whole against the company.

(1) 12 W. R. 727; 4 N. R. 127.

(2) Law Rep. 9 Eq. 370.

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between the lessor and the company, in which case it is settled that the distress issued against the company is not made void by sect. 163, but is, like every other proceeding, subject to the power of the Court, to deal with according as the Court think right. The Court has dealt with it by putting the landlord, who has not forfeited his right, in the same position as any other creditor, as he may go in and prove, which appears to be the result of what has been done in this case.

20 L. J. 21 Ch. D. 324

But in some cases between the landlord and the company, if the company for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estates for their own purposes, they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it.

There is nothing to shew that Mr. *Heavan* has in any way deprived himself of his right to receive the full amount of the rent. He appears to have been ready to make any reasonable arrangement, and there seems to be nothing to affect his right to do what was best for himself.

19 L. J. 66 Ch. 17 Ch. D. 255

That being so, we must consider what is the position of a stranger under the Act, the landlord having the power of distress against the tenant:—[His Lordship read the 163rd section.] Now these words cannot be taken as meaning that the distress is to be absolutely void to all intents, or else the Court would have no jurisdiction to allow the landlord to proceed; and, moreover, a distress would be void as against another lessee if the goods of the company were left on the land and were taken. But it is impossible that a distress on land can be void merely because the company have goods there.

20 L. J. 165.

In no other part of the Act is any person dealt with except the company, its creditors, and its contributories. The sole object of the Act was to make an equitable provision in the nature of a bankruptcy for the distribution of the effects of the company

amongst the persons entitled, but not to alter any other rights which they might acquire during the winding-up. If the official liquidator chooses to leave goods in the order and disposition of a bankrupt, there is nothing, as far as I can see, to prevent the assignee from taking them; and so if he leaves goods in a house where a landlord has a right to distrain, the official liquidator must take the consequences. It must be the true meaning of the Act to consider these provisions as confined to proceedings by a creditor of the company against the goods of the company; and the Act must be read according to the manifest intention, which could not have been that during the many years over which the winding-up may extend the Court should have power to interfere with the rights of every one who happened to have goods of the company in his possession. The landlord has a right to proceed against his tenant, and against the goods of every stranger which happen to be upon the land, and subject to distress.

As a general rule, I should have no hesitation in granting leave to a landlord to pursue his rights by distress for rent accrued during the time when the official liquidator chooses to leave the goods on the land.

SIR G. MELLISH, L.J.:—

I agree. If the official liquidator, for the convenience of the winding-up, does not surrender the lease, but continues to keep possession for the purpose of obtaining a better price for the goods, the landlord should not be deprived of his right to recover his rent.

It is a question of general importance whether this section relates only to distress against the company, that is to say, where the company is the debtor, or extends, as has been contended, to all cases of distress. The landlord is, by the law of this country, entitled to take as a security for his rent the goods upon his land, whomsoever they belong to. Then, was it intended to deprive the landlord of that right if the goods happened to belong to a company under liquidation.

It would be very extraordinary if the Legislature had deprived the landlord of that right without clear and express words, and

L. JJ. 1871 *In re* LUNDY GRANITE CO. *Ex parte* HEAVAN.

20 Eq 7

without giving him any compensation. The right to prove debts is confined to creditors of the company, and if this section makes this distress void, I do not see what power the Court would have to say that the landlord has any right to prove for his debt. It would be very extraordinary if, during the whole time of a liquidation, the liquidator might make any agreement with any insolvent tenant, and keep the goods on the land without any risk. The difficulty is not met by saying that the landlord can get leave to proceed under sect. 87, for that section is confined to proceedings against the company:—[His Lordship read the section]. This throws a good deal of light upon sect. 163, and when we look at the place where sect. 163 comes in, it is seen clearly to deal with the rights of creditors under the winding-up. As to all the words, except the word "distress," there can be no doubt, and I think that they all in some way relate to proceedings by a creditor of the company against the company, in which the company would be a Defendant. It was not the intention of the Legislature to deal at all with the rights of a landlord, who may be a total stranger to the company, and may not know to whom the goods belong.

It was said that Mr. *Heavan* was a party to the proceedings between the company and the proposed new lessee, but that gives no equitable right against him.

We must discharge the two orders. Mr. *Heavan* will have his costs below, and the official liquidator will have his out of the estate.

Solicitors: Messrs. *Vizard, Crowder, & Co.;* Mr. *R. Miller.*

In re EMPIRE ASSURANCE CORPORATION.

L. JJ.
1871
March 20.

LEEKE'S CASE.

Acceptance of Shares—Contributory—Promotion-money—Qualification of Director—Paid-up Shares.

L., a director of an old company, which was agreed to be sold to a promoter, on behalf of a new company, was named in the articles of the new company as a director; and fifty shares, the qualification of a director, were allotted to him, and registered in his name as paid-up shares. The nominal value of the shares was paid by the promoter, by cheques given him on account of his promotion-money, under an agreement between him and some of the directors of the old company. *L.* never attended the board meetings, and was no party to the agreement for the payment of the promotion-money; and he did not sign any application for or acceptance of the shares which were allotted to him. But he attended an extraordinary general meeting of the company, in which he spoke of himself as nominal chairman, and excused himself on the score of ill-health from taking part in the affairs of the company. A proxy was used on his behalf, which he denied having signed. The company was afterwards wound up:—

Held (affirming the decision of *Stuart*, V.C.), that *L.* was a contributory for fifty unpaid shares.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*. The case is reported (1).

The question arose on a summons taken out by the personal representatives of Admiral Sir *Henry Leeke*, who sought to have his name removed from the list of contributories of the *Empire Assurance Corporation, Limited*, in respect of fifty shares in the company.

Admiral *Leeke* was originally a shareholder and director of the *British Union Insurance Company*, whose registered office was at 27, *Gresham Street, London*. On the 1st of September, 1865, an agreement was entered into between *F. J. Price*, *B. Bullock*, and *C. E. Hobart*, three of the directors of the *British Union Company*, and one *W. Gidley Lake*, who was engaged in the formation of a new company, by which the directors agreed to transfer the business of the *British Union Company* to *Lake*, on behalf of the new company, and *Lake* agreed to pay the shareholders of the *British*

(1) Law Rep. 11 Eq. 100.

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Union £3000. The agreement contained a clause providing "that such of the shareholders of the *British Union Company* as like to come in and take shares in the new company shall be entitled to do so, and shall be credited with £1 per share, Admiral *Leeke*, *F. J. Price*, *C. E. Hobart*, and *B. Bullock* agreeing to join the board of the new company."

The agreement was adopted at a meeting of the shareholders of the *British Union*, on a motion proposed by Admiral *Leeke*.

The new company was registered under the name of the *Empire Assurance Corporation, Limited*, and immediately afterwards, namely, on the 25th of October, 1865, an extraordinary general meeting was held, at which the above agreement was adopted, and a resolution was passed, which was subsequently confirmed, that the articles of association should be amended, by providing, among other things, that a provisional agreement, that the *Empire Corporation* should pay *George Bailey* £10,000, should be confirmed. It was admitted that *George Bailey* was *W. Gidley Lake*, who stated that he had assumed the name of *Bailey* in pursuance of an arrangement with the directors, under which he was to receive cheques in respect of the sum agreed to be paid to him, and he was to pay up the subscribed capital of the shares which should be taken by such of the directors of the *British Union* as should become directors of the *Empire*, to the amount of the qualification, which was fifty shares of £10 each.

On the 20th of November a board meeting was held, at which Admiral *Leeke*, who was named as a director in the articles, but was not present at the meeting, was elected chairman of the *Corporation*, and fifty shares were allotted to him. It was also resolved that a banking account should be opened, and that cheques should be drawn for sums amounting to £7000 in favour of *Bailey*.

The next board meeting was held on the 12th of December. Admiral *Leeke* was entered in the directors' attendance-book as present; but he denied that he had attended the meeting, although he admitted that he had been in the room for a few minutes at the close of the meeting about the affairs of the *British Union*, which were conducted in the same room.

The banking account was not opened till June, 1866, and in that

month cheques were drawn in favour of *G. Bailey* to the amount of £6500, which *W. G. Lake* indorsed under the name of *Bailey*, and repaid the money to the *Empire Company's* account, to cover the amount due on the directors' shares. In this manner Admiral *Leeke* was credited with £500, the full amount due on his shares.

It was admitted that there was no evidence of any application for shares ever having been made by Admiral *Leeke*, and he positively denied ever having applied for shares, or having agreed to accept any, or having received any certificates, or any notice that the shares were allotted to him.

It was not alleged that Admiral *Leeke* attended any other meeting until the 18th of April, 1867, when an extraordinary general meeting of the shareholders was held to consider the propriety of winding up the company voluntarily. It appeared from a shorthand note of the proceedings that, at the commencement of the proceedings, Admiral *Leeke* asked leave to say a few words, in the course of which he said that he might call himself the nominal chairman, and apologized, on the ground of ill-health, for not having taken more part in the affairs of the company, and requested that another gentleman should take the chair. In his affidavit, he stated that his reasons for not more distinctly repudiating any connection with the company was an apprehension that such a course might prove injurious to it; and he denied that he took part in the meeting, or signed a proxy.

It appeared, however, that, on a scrutiny being taken of the notes, a proxy was produced purporting to be signed by Admiral *Leeke*.

On the 4th of May, 1867, the company was ordered to be wound up, and Admiral *Leeke's* name was placed on the list of contributories for fifty shares. Admiral *Leeke* died in 1869.

The Vice-Chancellor refused the application to remove Admiral *Leeke's* name; and his personal representatives appealed from this decision.

Mr. *Hardy*, Q.C., and Mr. *De Longueville Giffard*, for the Appellants:—

We contend, in the first place, that Admiral *Leeke* was never a

L. JJ. 1871 LEEKE'S CASE.

shareholder of the *Empire Corporation*. Although he was named in the articles of association as a director, he never acted as one, nor did he ever apply for or accept shares, nor was he aware that shares had been allotted to him. And although his presence at the extraordinary meeting of the 18th of April, 1867, may have fixed him as a director, that would not constitute him a shareholder. He never applied for or accepted any shares, nor was he aware that any had been allotted to him: *Marquis of Abercorn's Case* (1); *Tothill's Case* (2); *Stock and Roney's Case* (3); *Currie's Case* (4).

Secondly, if Admiral *Leeke* was a shareholder, it could only be as the holder of paid-up shares. The issuing of paid-up shares was recognised by the *Companies Act*, 1862, s. 25, as legal. The shares were fully paid up by *Lake* out of the £6000 which he received as promotion-money. It might be true that the arrangement between *Lake* and the directors was not one of which the Court would approve; but it has never been impeached, and Admiral *Leeke* was no party to it.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for the official liquidator, were not called on.

SIR W. M. JAMES, L.J.:—

I think this is a clear case. I do not express any opinion upon the cases respecting paid-up shares referred to by the Vice-Chancellor in his judgment, nor do I wish to be considered as concurring in all that His Honour said concerning them.

The main facts are clearly proved. Admiral *Leeke* was a shareholder and director in a company which became merged in a new company. He was party to an agreement by which the shareholders in one company were to be entitled to shares in the other, and in which he agreed to be a director of the new company. Fifty shares in the new company were allotted to him corresponding to the qualification of a director. He knew that he was appointed a director, he attended a general meeting in the character of chairman, and apologized on the ground of ill-health for

(1) 4 D. F. & J. 78.
(2) Law Rep. 1 Ch. 85.
(3) 10 Jur. (N.S.) 790,
(4) 3 D. J. & S. 367.

not taking part in the affairs of the company, and requested that the deputy-chairman should take the chair in his place. It is impossible to say, after that, that he had not assented to be a director; and that being so, he must be taken to have accepted the qualification of a director, namely, fifty shares.

As to the other question, namely, whether the shares were paid up, the transaction which was said to have amounted to payment was one of the most shocking I have ever met with in these cases of winding-up. It is a satisfaction to think that Admiral *Leeke* was no party to this transaction; but no person can be allowed to take a benefit from the fraud of another. Consequently, Admiral *Leeke's* name must remain on the list for fifty ordinary shares, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the evidence plainly establishes that Admiral *Leeke* agreed to take fifty shares in the company. He certainly knew of the agreement with *Lake* for the sale of the company, which contained a statement that he had agreed to become a director of the new company, for he moved its adoption by the general meeting of the *British Union*, and I think he must be taken to have adopted the statement contained in that agreement. It is said that the agreement was ambiguous, whether they were to be unpaid or paid-up shares; but we must take them to be such shares as would form the qualification of a director. It is true that he denies having acted as a director; but if he did not, his speech at the meeting would have been a complete acceptance of the office. Then as to the manner in which his shares were paid up. I think it is quite clear that, being a director, he could not avail himself of a payment made in a transaction which the directors had no right to carry out.

Solicitors for the Appellants: Messrs. *Sheppard & Riley.*
Solicitor for the Official Liquidator: Mr. *Pulbrook.*

L. J. J.
1871
March 7.

DOGGETT *v.* EASTERN COUNTIES RAILWAY COMPANY.

Practice—Revivor for Costs—33 & 34 *Vict. c.* 28, *s.* 19.

A decree was made in 1842, ordering the Defendants to pay the costs of the two Plaintiffs. Nothing remained to be done except taxation and payment of costs. In 1844 the solicitors of the Defendants gave to the solicitors of the Plaintiffs an undertaking to pay the costs when taxed, including some costs not payable under the decree. In 1857 the Plaintiffs died, and in 1870 the personal representative of the Plaintiff who had died first obtained an order of course to revive, the other Plaintiff having no personal representative. Vice-Chancellor *Stuart* having refused to discharge this order:—

Held, on appeal, that the undertaking by the Defendants' solicitors to pay costs took away the right to proceed against the Defendants for them; and, apart from this, that the order had been obtained by a person not having an interest:

Held, further, that the statute 33 & 34 Vict. c. 28, s. 19, though retrospective as to the order for payment of costs, is only prospective as to the abatement, and does not authorize a revivor for costs where the death has occurred before the passing of the Act.

THIS was a motion by the company by way of appeal from a decision of Vice-Chancellor *Stuart*.

On the 22nd of December, 1842, a decree was made in the suit, which, among other things, ordered the company to pay the costs of the Plaintiffs. On the 19th of January, 1844, the solicitors of the company gave the Plaintiffs' solicitors an undertaking to pay the costs when taxed, the undertaking also including some costs which the decree did not carry. The costs were neither taxed nor paid, but nothing else remained to be done. On the 30th of October, 1869, the Plaintiffs' solicitors obtained an appointment to tax the costs; but when it was attended it was found that both the Plaintiffs were dead. *Ann Doggett* then obtained an order of revivor by Petition of course, stating the deaths of the Plaintiffs in 1857, stating herself to be the legal personal representative of that Plaintiff who died first, and shewing that there was no legal personal representative of the other. The company moved to discharge this order, and the application having been refused by Vice-Chancellor *Stuart*, the present appeal was brought.

Mr. *Dickinson*, Q.C., and Mr. *Smart*, for the appeal motion:—

There are three objections to this order: First. Legal personal

representatives of both Plaintiffs ought to have been parties: *Fallowes* v. *Williamson* (1). Secondly. We say that the *Statute of Limitations* bars the right to revive; and even if not, this ought to be refused as a stale demand. Thirdly. There cannot be a revivor for costs at all in this case, the abatement having occurred long prior to the passing of 33 & 34 Vict. c. 28. The provision in that Act, sect. 19, as to revivor for costs, is not retrospective as regards the abatement. The change from "shall have" to "shall" shews that it was not intended to be so.

Mr. *Bristowe*, Q.C., and Mr. *Cecil Russell*, in support of the order:—

The Act is remedial, and is to be construed liberally. "Shall have" governs the whole clause, and makes it retrospective: *Bennett* v. *Lytton* (2). Under 1 & 2 Vict. c. 110, time does not run till there is a present right to receive; now, there was no right to receive till the costs had been taxed. Time is not a bar to the right to revive after decree: *Earl of Egremont* v. *Hamilton* (3); *Alsop* v. *Bell* (4). The undertaking gives a right to revive: *Tucker* v. *Wilkins* (5).

SIR W. M. JAMES, L.J.:—

I am of opinion that the application for this order of revivor was a very ingenious and very bold experiment, but that it cannot succeed. The decree made in 1842 directed certain accounts to be taken, certain inquiries to be made, and certain costs to be taxed and paid. In 1844 the parties were minded to dispense with any further assistance from the Court, the demands of the Plaintiffs were submitted to, so that nothing further remained to be done; and as the costs were practically due to the Plaintiffs' solicitors, a direct undertaking for payment was given to the Plaintiffs' solicitors by the solicitors of the railway company, thus giving those solicitors a direct claim for the costs. That being so, the undertaking, instead of being favourable to the claim to revive, is fatal to it, for it was in substitution for the order, and included costs not included in the order. The suit having thus

(1) 11 Ves. 306.
(2) 2 J. & H. 155, 158
(3) 1 B. & B. 531.
(4) 24 Beav. 451.
(5) 7 Sim. 349.

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been terminated, one of the Plaintiffs dies in June, 1857, the other later in the same year; and then in 1870 this attempt is made to revive the suit, which was for all purposes ended in 1844, and to enforce an order which had been abandoned. I am further of opinion that this order to revive has been obtained by a person who, according to the forms of the Court, has no interest; and, moreover, after such a lapse of time, it appears to be in the discretion of the Court whether revivor will in any case be allowed; and, as a matter of discretion, I certainly should not allow it here.

This being so, it is not necessary that I should give any opinion on the construction of the statute, but it is better that I should not avoid doing so. I am of opinion that the enactment does not bear the construction which has been pressed upon me, and does not authorize revivor for costs in the case of a death occurring before the passing of the Act. The grammatical construction of the words is pretty plain, and agrees with the general rule that a statute *primâ facie* does not make a person liable for a debt which has ceased to exist before the Act passes. Thus, if a statute were passed to extend the period of limitation as to simple contract debts from six to a greater number of years, it would require strong words to have the effect of reviving the right of action for a debt which had been barred by the existing statute before the Act passed. In the present case, there being no right to revive when the Act passed, it would be a strong thing to let a personal representative revive under it after such a lapse of time. But it is not necessary to resort to the general rule. If the Legislature had intended the section to apply where death had already taken place, it would have said, "Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards *have* become abated," not "shall afterwards become abated." The language used shews clearly to my mind that the enactment was intended to be retrospective as to the order, but only prospective as to the abatement. This makes the operation of the section reasonable. It would be monstrous if the Act were held to make persons liable to a demand from which they had been set free more than twenty years before. The order of revivor, therefore, must be discharged.

Solicitors: Mr. *W. H. Shaw*; Messrs. *Wood & Hare.*

CRÉDIT FONCIER AND MOBILIER OF ENGLAND *v.* LORD SONDES.

1 J. JJ.
1871
March 18.

Practice—Bill—Schedule.

Leave given to file a bill of complaint, with a schedule containing copies of pleadings referred to in the bill.

MR. WALLER applied for leave to file a bill, with a schedule annexed to it. He stated that the object of the suit was to set aside the award of Lords *Salisbury* and *Cairns*, the arbitrators appointed by the *London, Chatham, and Dover Railway* (*Arbitration*) *Act*, and that it was considered necessary to set out *in extenso* a bill which had been previously filed by the present Plaintiffs against the *London, Chatham, and Dover Railway Company* and others, and also the answers to a cross bill. The Plaintiffs, he stated, had in their possession many printed copies of these earlier pleadings, and great expense would be saved if they were allowed to be annexed by way of schedule, so that it would only be necessary to refer to them briefly in the bill. The Clerk of Records and Writs had refused to file the bill in this form without the sanction of the Court, which Vice-Chancellor *Stuart* had declined to give. The case of the *Governors of the Grey Coat Hospital* v. *Westminster Improvement Commissioners* (1) was referred to.

SIR W. M. JAMES, L.J.:—

It is evident that considerable expense will be saved by the course proposed, and I think you may have leave to file a bill in the form proposed, but copies of all the scheduled documents must be served along with the bill.

SIR G. MELLISH, L.J., concurred.

Solicitor: Mr. *F Heritage.*

(1) 2 De G. & J. 61.

L. JJ.
1871
March 15, 16.

RICHARDSON *v.* YOUNGE.

Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 28—*Mortgagees—Acknowledgment—Joint Mortgagees—Trustees—Redemption.*

8 QB 246
11 CLD 287
15 CLD 345

Held (affirming the decree of *Malins*, V.C.), that an acknowledgment of the title of a mortgagor given by one only of two joint mortgagees, who, on the face of the mortgage deed, were shewn to advance the money on a joint account as trustees, did not keep alive the right of redemption either as against the whole property or against a moiety of it, but was wholly inoperative.

THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Malins*, dismissing his bill.

The Plaintiff mortgaged certain property in 1834, and in 1843 the mortgage was transferred to the Defendants *Younge* and *Wilson* by a deed, to which the Plaintiff was a party, and in which the Defendants were described as trustees, and the money stated to be advanced by them on a joint account. Ever since 1845 the Defendants had been in possession of the property. The present bill was filed in 1867, on the strength of two letters, which the Defendant *Wilson* had written to the Plaintiff in 1854, and on which the Plaintiff relied as an admission of his right to redeem. It was contended in the Court below that they were insufficient in substance, and, moreover, that an acknowledgment by one of the two mortgagees would not take the case out of the *Statute of Limitations*. Vice-Chancellor *Malins* was in favour of the Defendants on the latter ground, and dismissed the bill (1).

Mr. *Glasse*, Q.C., and Mr. *Freeman*, for the Appellant:—

The acknowledgments are clearly good in form. The acknowledgment by one of two joint mortgagees must, we submit, be treated as the act of both, as the entry of one joint tenant will revest the estate of both (2). Suppose the other mortgagee were dead, how could *Wilson*, who gave the acknowledgment, resist redemption? There must be a right to redeem as against him;

(1) Law Rep. 10 Eq. 275. (2) 2 Crui. Dig. 4th Ed. p. 377.

and, at all events, under the provisions of 3 & 4 Will. 4, c. 27, s. 28, as to several mortgagees, the Plaintiff can redeem a moiety; but, we submit, it is a better construction to hold that those provisions apply only to mortgagees with distinct interests, and that the case of joint mortgagees is governed by the principles applicable to joint tenants at common law, and grounded on their unity of title.

[They referred to *Robinson* v. *Hofman* (1), *Channell* v. *Ditchburn* (2), and *Fordham* v. *Wallis* (3).]

Mr. *Cotton*, Q.C., and Mr. *C. Walker*, for the Respondents:—

Taking the first part of sect. 28, which provides for acknowledgment by the "mortgagee," it is clear that the acknowledgment must be by all, for they together make the "mortgagee." The latter provisions as to several mortgagees, according to their true construction, apply, as we submit, only to cases where the mortgagees have distinct interests, and not to the case of trustees whose legal estate in the land is joint, and whose interest in the money is for all purposes, both at law and in equity, joint. One mortgagee cannot bind the other as agent, for signature by an agent is not enough.

[They referred to *Hyde* v. *Johnson* (4) and *Way* v. *Bassett* (5).]

Mr. *Glasse*, in reply.

SIR G. MELLISH, L.J.:—

This is a suit for the redemption of mortgaged property. The defence set up is, that the two mortgagees have been in possession of the estate for more than twenty years, and that therefore, under 3 & 4 Will. 4, c. 27, s. 28, the mortgagor cannot maintain the suit. To this it is replied that *Wilson*, one of the mortgagees, has within twenty years given an acknowledgment in writing of the Plaintiff's title; and it has been admitted before us that the letters he wrote are such as to amount to what, if he had been the sole mortgagee, would have been a sufficient acknowledgment. The question, then,

(1) 4 Bing. 562
(2) 5 M. & W. 494.
(3) 10 Hare, 217.
(4) 3 Scott. 289.
(5) 5 Hare, 55.

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is what, under sect. 28, is the effect of an acknowledgment in writing by one of two mortgagees, who appear to be trustees on the face of the deed under which they claim. Three views were suggested, first, that an acknowledgment by one of the two will bind both; secondly, that it will bind one-half of the property, and enable the Plaintiff to redeem one-half on payment of one-half of what is due; and thirdly, which is the view adopted by the Vice-Chancellor, that the acknowledgment by one of the two has no effect. If the attention of the framers of the Act had been called to this point, I think that they would either have provided that an acknowledgment by one should bind both, which would have been very reasonable, or that an acknowledgment by both should be necessary, and an acknowledgment by one wholly ineffectual; but I do not think that the Legislature would ever have enacted that an acknowledgment by one should be effectual as to one moiety. That would not be reasonable or convenient, and unless the language of the Act is clear to that effect, we ought not so to construe it. As regards the contention that the right to redeem the whole estate is subsisting, I think that, though it would be very reasonable to say that an acknowledgment in writing by one of two joint mortgagees of the mortgagor's right to redeem should bind both, it is impossible so to construe the words. The first provision as to acknowledgment, which only refers to an acknowledgment by "the mortgagee," would, if it stood alone, require an acknowledgment by all the mortgagees where there were more than one, it being provided by the Act that the singular number shall extend and be applied to several persons and things. The distinction, moreover, is drawn between the mortgagors and their agents, which shews that the question of agency was called to the attention of the Legislature, but there is no provision as to signature by an agent for the mortgagee. A signature, therefore, by one of several mortgagees, as agent for the others, would be ineffectual, and it appears impossible to hold that the acknowledgment of one binds all the others.

Then, is the acknowledgment effectual as to a share? The section says: "Where there shall be more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more

of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent, by from or under him or them." Now, these latter words appear only to apply to the case of a person having a several interest, and not to the case of joint tenants; for if a joint tenant dies, there is no transmission of interest, and no person claims anything under him. Again, the section proceeds to say that the acknowledgment shall be effectual against "any person or persons entitled to any estate or estates, interest or interests, to take effect after, or in defeasance of, his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent." The acknowledgment, therefore, is not to affect the interest of other mortgagees. Again, the section proceeds: "And where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage-money," which shews that the Legislature thought that the case already provided for was the case where the person giving the acknowledgment had some ascertained share in the mortgage-money; and that if the money had not been divided, but the land had, it was reasonable that, if a person holding a portion of the land gave an acknowledgment, he should be liable to be redeemed as to that portion. It appears to me, therefore, to be the best construction of this involved and difficult section to hold that the provisions as to acknowledgment by some of several mortgagees apply only where they have separate interests either in the money or the land. In the present case, I do not think that Mr. *Wilson* had any separate interest either in the money or the land. He was simply joint tenant with his co-trustee of the land, and jointly entitled with him to the mortgage-money. Had the mortgagees not been trustees, the case would have stood very differently, for they must almost of necessity have been entitled to some distinct interests in the mortgage-money; and if they had been partners, difficult questions might have arisen; but in the present case, which is

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simply that of trustees, I agree with the conclusion of the Vice-Chancellor.

SIR W. M. JAMES, L.J. :—

I am of the same opinion. Our decision is confined to the case of mortgagees who are trustees, and are shewn to be such on the face of the deed.

Solicitors: Mr. *F. F. Jeyes*; Mr. *W. M. Wilkinson.*

GRAND JUNCTION CANAL COMPANY *v.* SHUGAR.

L. C.
1871
Jan. 11, 12, 13, 17.

Subterranean Watercourse—Surface Watercourse—Local Board of Health— 21 & 22 *Vict. c.* 98, *s.* 68, *art.* 3—11 & 12 *Vict. c.* 63, *s.* 45.

Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land.

Where a local board of health are interfering with a watercourse in a manner not authorized by the *Local Government Act* (21 & 22 Vict. c. 98), s. 68, art. 3, they will be restrained from so doing, and the person injured will not be left to his remedy under the compensation clause of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), s. 144.

Decree of the Master of the Rolls reversed.

THIS was a suit to restrain the Defendant, representing the *Local Board of Health of Tring*, from diverting certain water.

In pursuance of powers given by their Acts, the *Grand Junction Canal Company* many years ago intercepted a stream flowing from the *Silk Mill Pond*, near *Tring*, and caused the water to flow into a branch of the canal at a high level. The Local Board had lately made a drain near and below the *Silk Mill Pond*. It was not disputed that this drain and other works of the Local Board had lowered the water in the *Silk Mill Pond*, and that the water now came out at a lower level, and had to be pumped up by the Plaintiffs, but there was a considerable conflict of evidence as to the manner of the interference.

The *Silk Mill Pond* was supplied by streams from two ponds called the *Horse Pond* and the *Dundale Pond*, and partly, as the Defendant alleged, by underground springs, which rose in the bed of the *Silk Mill Pond* and in the channels of the streams. The Local Board had executed other drainage works which affected the underground springs in the whole district, and they denied that this particular drain had affected the water in the *Silk Mill Pond*. The Local Board also contended that the general underground water-level had been lowered by these operations, and that there were holes or fissures in the bed of the pond which had been formerly kept full of water at the old level, but were now

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empty; and that the water in the pond having thus lost its support, ran into the chalk beneath through the holes or fissures. It was also suggested that the contractor, in making the drain, had laid great part of the *Silk Mill Pond* dry for a time, the result of which was that the bed of the pond became full of cracks, and that thus the water in the pond could not now be kept at the former level. The Plaintiffs produced evidence that if the drain made by the Local Board had been constructed in a different way, the leakage from the stream would have been avoided, and that even now it might be avoided, which was denied by the Local Board and their witnesses. In the view which the Lord-Chancellor took of the evidence, it was established that some of the water flowing in the stream was withdrawn by the action of the drain. Before the works were begun, and during the progress of the work, the company had warned the Local Board of the damage which they were likely to do, and had been assured by them that when the works were completed the company would have no cause for complaint.

The Master of the Rolls refused to grant an injunction, and dismissed the bill, without prejudice to the Plaintiffs proceeding for compensation by action at law, and under the Local Board Acts (1).

The Plaintiffs appealed.

(1) 1870. April 21.

LORD ROMILLY, M.R., after stating the facts of the case, continued:—

The evil complained of by the Plaintiffs really resolves itself into this, that instead of a large quantity of water coming into their canal at the high level, it flows into the *Tring Ford Reservoir* at a much lower level, and consequently a much larger quantity of water than heretofore has to be pumped from the reservoir into the canal, imposing an expense upon the company, and consequently to that extent creating a loss to them. On the other hand, on examining the evidence of the Local Board, I do not see in what other way they could possibly conduct their drainage, and although I should not hesitate to impose an injunction on them if I found they were polluting the water which was necessary for drinking or culinary purposes, I do not feel myself justified in imposing this restriction when I find the course they adopt has only the effect of causing some additional expense to the Plaintiffs. There exist, as it appears to me, two reasons also which confirm me in this view: the first is, that the injury so caused to the canal seems to me to be produced from tapping the subterranean water at a lower level, and thus drawing off the water which would flow at the higher level. This, if done by a private individual, could not be complained of.

Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., and Mr. *L. Field*, for the Appellants :—

The Local Board say that the damage has been done by intercepting subterranean springs, which they have a right to do; but we say that, though we perhaps lose some water in that way, we lose more by their drawing off the surface water. Even if the principle of *Chasemore* v. *Richards* (1) does not apply to subterranean springs like these, we have still a right to our surface water.

The Local Board are acting under the *Local Government Act* (21 & 22 Vict. c. 98), and by sect. 68, art. 3, they are expressly prohibited from interfering with any watercourse in such manner as to injuriously affect the supply of water to any canal. They are therefore not proceeding under their powers, but against the restrictions on their powers, and we cannot be compelled to go for compensation under the Act. We say their work is unskilfully performed, and that they might have made their drain so as not to draw off the water.

Mr. *Eddis*, Q.C., and Mr. *Lindley*, for the Defendants :—

The Local Board is a public body acting for the public benefit under 21 & 22 Vict. c. 98. They are making the drain in pur-

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This is established by the case of *Chasemore* v. *Richards* (7 H. L. C. 349), and I know of nothing, nor has there been anything pointed out to me in the statute under which the Local Board acts, to deprive them of this right, which would be enjoyed by private individuals. In the second place, injunctions are granted by the Court of Chancery to stop irreparable injury, and not to stop an act which merely creates a little extra expense, the injurious effects of which are easily measured and compensated for by damages. The Act under which the Local Board proceeded being the *Public Health Act*, 1848, gives persons injured ample compensation for damage done by reason of works under the Act; and it is to be noticed, as the Plaintiffs sue as a company which is suing in its corporate character, and which, therefore, neither eats, drinks, nor smells, the only way in which individuals who compose the company can be affected by the works of the Local Board is by a diminution of the dividend, which proper compensation will restore.

I am of opinion, therefore, that the bill ought to be dismissed, without prejudice to the Plaintiffs taking any such steps as they may be advised, either by an action at law or by proceeding under the Act, for the purpose of obtaining compensation for any injury they may have sustained.

(1) 7 H. L. C. 349; 5 Jur. (N.S.) 873.

(1) 7 H. L. C. 349; 5 Jur. (N.S.) 873.

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suance of duties imposed on them by the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), s. 45, and if they do any damage, compensation is to be recovered under sect. 144, and this Court ought to leave the Plaintiffs to that remedy. They have a right to make the drain, and any damage done is either capable of compensation under the Act or is *damnum absque injuriâ*. The result complained of is inevitable, for every drain must drain the surrounding land. We deny that the drain is not properly constructed. The board had no power to take the land, and if they cannot take the land and cannot make a drain through the land without doing damage which is the subject of an injunction, it will be impossible for the board to make the drain, which it is their duty to make.

We contend that this drain does not affect the pond; but even if it does, we have merely cut off springs underground, which we have a right to do, whatever the indirect consequences may be: *Acton* v. *Blundell* (1); *Rawstron* v. *Taylor* (2); *Broadbent* v. *Ramsbotham* (3); *New River Company* v. *Johnson* (4). Even though water is actually in a well, the adjoining landowner may dig down and draw it away, and we have at the utmost done no more than that. *Dickinson* v. *Grand Junction Canal Company* (5) has been overruled. The damage is very small, and on the balance of inconvenience this injunction ought not to issue.

Sir *Roundell Palmer*, in reply.

Jan. 17. LORD HATHERLEY, L.C., after stating the facts of the case, as in his opinion shewing that the Local Board, by the drain in question, had drawn off the subterranean springs, and in so doing had also drawn off the water from the running stream, continued:—

Now, as regards the law of the case, I should think it beyond dispute after *Chasemore* v. *Richards* (6). Mr. Justice *Wightman* there laid down the law very plainly in giving the opinion of the Judges upon the subject, and the distinction was there drawn—and, I should have thought, firmly established—between water which

(1) 12 M. & W. 324.
(2) 11 Ex. 369.
(3) Ibid. 602.
(4) 2 E. & E. 435.
(5) 7 Ex. 282.
(6) 7 H. L. C. 349; 5 Jur. (N.S.) 873.

comes no one knows exactly whence, and flows no one knows exactly how, either underground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel. When I say "once," of course I mean for such a period of time as that there can be no difficulty raised with reference to the rights of the parties. [His Lordship then read the judgment (1).] These few words contain all that need be said on the subject.

So one of the learned Judges, in *Acton* v. *Blundell* (2) said, that where a well had been made to receive underground water, and another man had made a well which took away the water from the first well, he has as much right to use the soil as the digger of the first well. A man cannot compel his neighbour to leave his own soil untouched, and prevent his having a well too. But, as regards flowing water, the case is quite different. He who is entitled to flowing water has simply the enjoyment of the water as it passes him, and, having passed him, it is transmitted to another, who has also a right of using it only for his own limited purpose, and he has a right to have it always coming to him to use for that limited purpose.

The point most closely pressed on me by Mr. *Eddis* and Mr. *Lindley* was this—how can you distinguish the case of a well where the water has been secured from the case of this running water? That is answered at once by the decision in the case of *Chasemore* v. *Richards* (3), and the distinction is plain. If you are simply using what you have a right to use, and leaving your neighbour to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is, *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the Local Board have made. As far as regards the support of the water, all one can say is this: I do not think *Chasemore* v. *Richards*, or any other case, has decided more than this, that you have a right to all

(1) 7 H. L. C. 366. (2) 12 M. & W. 324.
(3) 7 H. L. C. 349; 5 Jur. (N.S.) 873.

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the water which you can draw from the different sources which may percolate under ground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity. That appears to me to be clearly the course which the Local Board have taken, and, therefore, they have clearly and plainly given ground for the injunction.

The Master of the Rolls, in one part of his judgment—which I confess I cannot concur in, and yet it seems to be almost the point he mainly relied on—said, that inasmuch as this could be compensated for by money, he would not grant an injunction; that it was not the course of the Court, where a thing could be easily compensated for by a money payment, to grant an injunction. But I think he did not advert to the fact that this was the case of a parliamentary power granted to certain persons to execute certain works. I do not know that the expression was necessary; but however, it is expressed by the Legislature (21 & 22 Vict. c. 98, s. 68, art. 3) that the power shall not extend to do those things which are here complained of, and it is therefore a parliamentary contract by which, in consideration of their getting certain powers and no more, they shall be liable for everything else to the ordinary process of the law of the land. The difference between compensation under the Act of Parliament for an injury done under the Act, which the Master of the Rolls has reserved to these Plaintiffs, and for an injury done contrary to law, is this: If it is done by virtue of the powers conferred by the Act of Parliament, it is a case for compensation; and if the compensation accrues from an injury caused in the execution of the works, it means the lawful execution of such works as the Legislature has authorized. The Legislature, in effect, authorized the works to be done, and has said that the works being lawfully done, compensation shall be made in damages to any person who, if the Legislature had not authorized the act, would

have had a right to bring an action; inasmuch as the Act has authorized it, no action would lie, and therefore the Legislature thought it right to give compensation. But when the Legislature has armed a body like this with considerable powers, and has expressly said they shall not overstep them in a given direction, the amount of damages—unless so trivial as to shew that the suit is purely of a vexatious character, as in the case of *Holyoake* v. *Shrewsbury and Birmingham Railway Company* (1)—the amount of the damage, especially where it is a recurring damage, will not be taken into consideration at all, but the parties will be restrained. It appears to me that this is exactly a case for an injunction, and not for damages. It was said that this would be a mandatory injunction, but that objection loses its force in a case where the complaint was made immediately before the damage was done, and where it was met by a written notice, on the part of those who were about to do the works, that no such damage would be done or would accrue.

L. C. 1871 GRAND JUNCTION CANAL CO. *v.* SHUGAR.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Smith, Fawdon, & Low.*

DEAN *v.* BENNETT.

L. C. 1870 *Dec.* 21, 22.

Chapel—Dismissal of Minister—Meeting—Notice—Resolution—Charges.

By the deed of settlement of a Baptist chapel, it was provided that every minister should be liable to be forthwith removed by the decision of the church made at one meeting, and confirmed at a second meeting called by a notice which should expressly state the object of such meeting. A meeting was called, the notice expressing that it was for the purpose of bringing charges against, and considering the dismissal of, the minister. The minister did not attend the meeting, and it did not appear that evidence was produced in support of any charges, but the meeting passed a resolution that, in consequence of the minister having done certain specified things, he was not a fit and proper person for the office, and that his office should cease. A second meeting was called, the notice expressing that it was to be for the purpose of confirming and ratifying the resolution passed at the former meeting:—

Held, that to summon a meeting for the purpose of bringing charges generally, was improper; that if no reason had been given for the dismissal,

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(1) 5 Railw. Cas. 421.

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it might have held good; but that, under the circumstances, it was clear that the meeting had not had the opportunity of exercising a sound discretion in the matter, and the dismissal was invalid:

Held, also, that as the notice for the second meeting did not specify the resolution which was to be confirmed, that meeting was unable effectually to confirm the resolution passed at the first meeting.

Decree of *James*, V.C., affirmed.

Darlington School Case (1) questioned.

18 Eq 49, 63
L 74.
11 W.R. 356
21 L.T. 515

BY an indenture bearing date the 9th of December, 1852, a chapel and a piece of land at *Barnodswick*, in the county of *York*, were conveyed to the Plaintiff *Dean* and others since deceased, and their heirs, upon trust to permit the chapel to be from time to time used for the worship and service of Almighty God by the Church and Congregation of Christians at *Barnodswick*, commonly known by the name of Particular Baptists, and for such other purposes as the said Church should from time to time order or direct; and also to permit such person or persons to pray, preach, expound God's Holy Word, and officiate as minister of the said Church and Congregation as should hold and maintain certain doctrines in the deed mentioned, and who should and might from time to time be appointed for that purpose by the said Church. And it was therein provided, that every minister of the said Church should be liable to be forthwith removed by the decision, order, or direction of the said Church, made and declared at one meeting, and confirmed and approved at a second meeting to be called for that purpose in manner thereinafter mentioned. And that all decisions, orders, and directions of the said Church relative to any of the purposes specified and set forth therein, or to any other matter or thing whatsoever, should be from time to time made and declared by the male and female members of the said Church who should have been communicants for at least a previous period of six calendar months, or a majority of them actually present at a meeting of which notice should have been given publicly in the said chapel, or in another older chapel, during divine worship on Sunday morning, at least four days before the time of holding such meeting respectively. And it was therein provided that, whenever the Church should have to consider the appointment of a minister or ministers, or the dismissal of any minister or minis-

(1) 12 L. J. (Q.B.) 124; 14 L. J. (Q.B.) 67.

ters, or other matters therein mentioned, the notice to be publicly given in manner aforesaid should expressly state the object of such meeting, and each of the decisions, orders, and directions to be made and declared at any such last-mentioned meeting should be re-considered at a second meeting of the Church, to be convened by public notice to be given in manner aforesaid, expressly stating the objects thereof, and such decisions, orders, and directions of each such first meeting should not be construed or held to be binding until confirmed and approved at a second meeting.

The Defendant *Thomas Bennett* had been, since the year 1852, the officiating minister of the chapel. He was also in trade, and in 1867 was made bankrupt. Accusations of misconduct were made against him, and meetings were held on the subject, the congregation appearing to be nearly equally divided in opinion as to his conduct.

On Sunday, the 20th of September, 1868, a notice was read in the chapel that a meeting of the male and female members of the said Church, who had been communicants for at least six months, would be held on Saturday, the 26th of September, for the purpose of considering the dismissal of the Rev. *Thomas Bennett* as the present minister of the said Church. The meeting was held accordingly, and by a majority of the persons present of fifty-nine to forty-seven, a resolution was passed to postpone the consideration of the question for twelve months. It was alleged by the Plaintiffs, and denied by the Defendant, that this resolution was carried by the votes of persons who had not been communicants.

On Sunday, the 18th of October, 1868, a further notice was read in the chapel, that a meeting of communicants, described as before, would be held on Saturday, the 24th of October, for the purpose of bringing charges against, and considering the dismissal of, the Rev. *T. Bennett* as the present minister of the said Church, and of making and declaring such decisions, orders, and directions on the subject of the said meeting as the majority of the members present might think proper, or any other business.

A meeting was accordingly held on the 24th of October, at which forty-nine persons were present, the Defendant and his friends not attending, being of opinion, as they stated, that the meeting was illegal, and protesting against the meeting. It did

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not appear how the discussion at the meeting was carried on; but several resolutions were passed, one of which rescinded the resolution of the former meeting, and another was, "That, in consequence of Mr. *Bennett* having on different occasions uttered deliberate falsehoods, one of which is laid on the table before you in a printed circular, also of having on several occasions been seen drunk, also his inconsistent conduct as pastor of this church, this meeting unanimously agrees that he is not a fit and proper person to occupy the position of pastor, and that his office of pastor cease forthwith."

On the 25th of October, 1868, notice was given that a meeting of communicants, described as before, would be held on Saturday, the 31st of October, "for the purpose of confirming and ratifying the resolutions passed at the Church meeting held on the 24th of October."

A meeting was accordingly held on the 31st of October, at which forty-eight members were present, when the minutes of the previous meeting were read, and a resolution was unanimously passed, "That the above minutes be passed, confirmed, and ratified."

The Defendant, considering that he was not legally dismissed, attempted to enter the chapel, and was resisted by force. He then indicted for a riot several of the persons concerned. Other disturbances took place; and on the 15th of March, 1869, the bill in this suit was filed to restrain the Defendant from taking possession of the chapel or acting as minister. The Defendant contended that the notices had not been read in the chapel, and that the meeting was illegal.

The Vice-Chancellor *James* dismissed the bill with costs, being of opinion that the notice for the meeting of the 31st of October, 1868, was insufficient (1). The Plaintiffs appealed.

(1) 1870. Feb. 22. 9 Eq 625.

SIR W. M. JAMES, V.C., after stating the facts, and that in such a case everything ought to have been done in the strictest form, continued:—

It appears to me that, if a meeting was summoned for the purpose of bringing charges, those charges ought to have been communicated to Mr. *Bennett* before the meeting was called, so that he might have an opportunity of knowing what he was to meet. At that meeting a resolution was passed rescinding a resolution of the previous meeting, but of the intention to pass such a resolution no notice whatever was given.

The second resolution was, that in

W Reporter 9 Eq 625.

It was stated at the Bar that these resolutions and proceedings were entered in different books in the custody of different persons; but that all the members of the congregation must have been aware of what took place at the meeting.

Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, for the Appellants:—

The congregation had under the deed absolute power to dismiss their minister with or without cause, and therefore their finding the cause is immaterial, and can make no difference. There was no occasion to hear the minister or to give him notice of any charges, but he does not pretend to say that he did not know of the meeting and of the charges, so that he has in fact nothing to complain of. He might have gone there and have met the charges, and he cannot escape by keeping away. The object was to bring the whole conduct of the minister before the meeting, and then decide whether he was or was not to be dismissed: *In re Phillips' Charity* (1); *In re Fremington School* (2); *Reg.* v. *Governors of Darlington School* (3). The objection as to the notice upon which the Vice-Chancellor decided was not raised upon the pleadings,

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consequence of Mr. *Bennett* having done various serious things which are alleged against him, he is not a fit and proper person to occupy his position, and that his office should cease forthwith.

It did not appear on what evidence those charges were supported, or in what way they were investigated, or that any evidence in fact was given in respect of them, except that a certain person who was present, and who appears to have taken a very active part in the proceedings of this disturbed congregation, was required to read remarks made by a Commissioner in Bankruptcy. That certainly was not a mode in which anybody ought to be tried for any offence or be convicted. Those resolutions were, however, passed, and then it is said a subsequent meeting was held for the purpose of confirming those resolutions, and the resolutions were duly confirmed accordingly.

Now I hold that that second notice was perfectly insufficient and invalid in point of law, because, it being a notice to confirm resolutions, there was no way in which the congregation could be informed of the resolutions, and the only mode by which that notice could have been properly given was a notice stating the resolutions which had been passed, and convening a meeting for the purpose of considering those resolutions.

The second meeting held for confirming the resolutions is, therefore, void, and upon that ground I am of opinion that the Plaintiffs' case has failed, and the bill must be dismissed with costs.

(1) 9 Jur. 959.

(2) 10 Jur. 512.

(3) 12 L. J. (Q.B.) 124; 14 L. J. (Q.B.) 67.

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and was not thought of until it was suggested by the Vice-Chancellor himself, and the Plaintiffs have had no opportunity of meeting it.

Mr. *Kay*, Q.C., and Mr. *Wickens*, for the Defendant:—

The proceedings were most improper, and the Defendant could not be expected to attend and be ready to answer charges of which he knew nothing. He did what was quite right, protested against the legality of the proceeding, and he and his friends kept away. Where a power of dismissal is given, just cause will be implied, and if the discretion is to be absolute it must be distinctly so stated. In some cases just cause must be shewn, in other cases the power is absolute; but that in common justice must be distinctly stated; other cases like this lie between these, and some cause must be shewn. An officer is dismissed with cause, a servant without cause—a minister is an officer. The trustees come to seek the assistance of the Court, and must come with clean hands. Even if they have a right to act in this extraordinary manner, they should have given a proper notice for the second meeting. The notice does not even say where the resolution was to be seen.

Mr. *Fry*, in reply.

LORD HATHERLEY, L.C., after remarking on the hostilities between the nearly equal parties into which the congregation of this chapel was divided, said that there was nothing in the deed which made it necessary to allege any specific ground for the removal of the minister; that the form of the first notice was very proper, but the second was very extraordinary, inviting every one to bring any charges he liked against the minister; and that the charges alleged were general merely. His Lordship then continued:—

If this had been a case in which the power of dismissal was not simply and entirely arbitrary, no question could have arisen, because the course taken here was utterly inconsistent with any notion of justice or propriety. They first invite people to bring charges without saying what they are, and they then state in this vague fashion that the charges are established when the person supposed to be criminated has not heard what any one of the charges

is. No one would expect to find that such a course had been adopted in any assembly of English people, who are accustomed in some degree to the ordinary principles of justice, though they may not have any accurate idea of its form; and the only point I have to consider is, how far the *Darlington School Case* (1) goes, and whether by it the Court is compelled to hold that a resolution come to in this manner was legitimate and operative.

That case undoubtedly does create great difficulty. [His Lordship then stated the facts of that case.] The Court there laid great weight on the finding that the minister was unfit, and said that there was no traverse of the sound discretion; and if the meeting had a sound discretion, and if they found that he was unfit, in addition to the other things that they had found, there was no fault in the decision they had come to, and the decision must be upheld.

I cannot say that I am altogether satisfied with that reasoning, and I do not know how far that case was determined upon the point which arose upon the pleadings. If a number of reasons are assigned by those who are called upon to vote on a given subject, and those reasons are not merely expressed as arguments in the course of a debate, but are averred as those upon which the decision is founded, although the facts have never been investigated, then it seems clear that the proceedings have been altogether erroneous, and it cannot be said that we have got the true mind and judgment of the body.

Upon the whole, I do not feel myself so bound by that case as to hold here that a discretion has been exercised by a meeting which, on charges mentioned for the first time, the person charged not being present, comes to a vague general finding that he has been guilty of falsehood and drunkenness. Although they undoubtedly add unfitness, I cannot find that they have arrived at a sound judgment on this subject, or have exercised any discretion at all in such a strange and wholly irregular meeting. I think that they acted very oppressively, and in a manner which ought not to be in any way sanctioned or assisted by this Court interfering by injunction.

It appears to me, therefore, upon this higher ground, that the

(1) 12 L. J. (Q.B.) 124; 14 L. J. (Q.B.) 67.

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decree of the Vice-Chancellor is right, and I certainly agree with him on the lower ground which he took. In a case like this it is important that these things should be solemnly done. [His Lordship then read the provisions in the deed.] Now, I do not think it enough, on the occasion of the dismissal of a minister, to bring at the first meeting such vague charges, and then to say merely that the resolutions passed at the first meeting were to be confirmed at the second. It is not like the case of a board of directors, who have proper books provided and ordered by law to be kept so that every one can go and ascertain what has been done. It does not appear that there were proper books or any proper officer to keep them. In that state of circumstances they are called upon to confirm a resolution passed on a certain day without being told what that resolution was; and when I look at the deed and at the careful provisions as to the dismissal of the minister, I do not think this a sufficient compliance with the deed. The whole matter was to have been reconsidered at the second meeting, and the persons entitled to be present ought to have been told what they were asked to do.

Feeling, then, as I do, some doubt as to the soundness of the *Darlington School Case* (1), and that the conduct towards the Defendant has been oppressive, I do not consider myself fettered by that case; and, agreeing, as I do, with the Vice-Chancellor on the second point in this case, I can only dismiss this appeal with costs.

Solicitors: Messrs. *R. & W. B. Smith;* Messrs. *Ridsdale & Craddock.*

(1) 12 L. J. (Q.B.) 124; 14 L. J. (Q.B.) 67.

In re JONES.

L. C.
1870
Dec. 13, 14.

Solicitor's Suit—Costs—Indemnity.

Where a solicitor engages to indemnify the Plaintiff in a suit against the costs of the suit, and has the control of the suit, he will be ordered to pay to the Defendants their costs of the suit when dismissed.

Order of *James*, V.C., varied.

4 C.L.J. 176
4 C.L.D. 303.
16 L.J. 212

IN the year 1866, *J. T. Fielden* filed a bill on behalf of himself and all other holders of deferred, preference, and ordinary shares in the *Northern Railway of Buenos Ayres Company* against the company and the directors, praying that the issue of certain certificates might be restrained, and that certain persons might be restrained from acting as directors. The solicitor employed by the Plaintiff *Fielden* absconded, and in January, 1867, the Plaintiff obtained an order to change his solicitor, and appointed *B. W. Jones* solicitor for the Plaintiff in the suit. Several proceedings took place in the suit, and in June, 1867, some of the Defendants were attached for contempt and arrested. The attachments were afterwards discharged, and the Plaintiff was ordered to pay the costs of the attachments to those Defendants. Those Defendants then commenced actions at law against the Plaintiff, claiming damages as for an unlawful arrest; and the Court of Chancery restrained the actions, directing an inquiry as to the damages. A motion for an injunction by the Plaintiff was also made and failed; whereupon, as the Defendants contended, the Plaintiff became alarmed or dissatisfied, and unwilling to proceed with the suit; and on the 23rd of September, 1867, *Jones* gave the Plaintiff a letter in the following terms:—

"Dear Sir,—[*Yourself* v. *Northern Railway, &c.*] You having given your consent to be Plaintiff in this suit, at the request of divers other shareholders, I undertake to hold you harmless from all costs on either side. You will hold this letter as private and confidential, unless any necessity should arise for its use."

The suit was carried on; damages were awarded to the Defendants for their arrest; and many proceedings in the suit took

L. C. 1870 *In re* JONES.

place. In 1869 the Plaintiff died; his effects were sworn by his executor to be under £20, and the executor informed the Defendants of the letter of indemnity.

The Defendants thereupon presented a Petition, stating that the suit was frivolous and vexatious, and not instituted *bonâ fide*, and praying that the executor of the Plaintiff might be ordered to revive within fourteen days or the suit be dismissed; and that, in default of revivor, the costs might be paid by *Jones*.

In answer to this Petition, *Jones* stated that the irregularity in the attachment was caused by a mistake made by his clerk as to the time allowed to the Defendants for answering; that the letter was only intended to relate to the damages for the arrest, as to which he admitted that he would be personally liable, and not to the general costs of the suit; and that the control of the suit was not taken by him.

The Vice-Chancellor *James* made an order on the Petition that the executor should revive within fourteen days, and that, in default, the bill should stand dismissed without costs; and that the Petition should be dismissed against *Jones* without costs.

The Defendants appealed against so much of the order as dismissed the Petition against *Jones*.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the Appellants:—

It is clear that this was the suit of the solicitor, and that the Plaintiff was a mere puppet: in such a case the solicitor must be personally liable. It is true that *Jones* was not the original solicitor; but he carried the suit on, obviously in the hope of getting costs from the Defendants, knowing that the Plaintiff could not pay; and by means of this indemnity the Plaintiff was induced to go on. *Cockle* v. *Whiting* (1), *Dungey* v. *Angove* (2), and *Hilton* v. *Woods* (3), shew what are the principles on which the Court acts in these cases.

Mr. *Eddis*, Q.C., and Mr. *E. C. Willis*, for *Jones*:—

The Defendants cannot get this order without reviving the suit. Moreover, if the prayer of the petition of appeal is granted, the

(1) 1 Russ. & My. 43. (2) 2 Ves. 304.
(3) Law Rep. 4 Eq. 432.

(a) See W.N. (1870) 107, 18 W.R. 729.

absurd result will follow, that the suit will be dismissed without costs, and yet *Jones* will be ordered to pay them. There is no proof that the Plaintiff's estate is insolvent, and that the Defendants may not get their costs from his estate. That estate must be first administered. The letter is unfortunate in its terms, but was only intended to apply to the proceedings for damages, and not to the general costs of the suit. At all events, up to the date of the letter, the suit was that of the Plaintiff; and there is no evidence that the suit was at any time taken out of his control or not his suit. It was not begun by the present solicitor, and the Plaintiff is only suing on behalf of himself and others.

LORD HATHERLEY, L.C. :—

I cannot altogether accede to the view which the Vice-Chancellor has taken of this case, because, however anxious a solicitor may be in the execution of his duty, I think it the duty of the Court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned, and that care should be taken to see that the litigation is the *bonâ fide* litigation of the client who instructs the solicitor, and not a litigation carried on altogether on the solicitor's account.

Now, it is hardly necessary to refer to the case of *Cockle* v. *Whiting* (1), inasmuch as the general principles of the Court are perfectly well established upon the point; and, indeed, there is nothing more than a *dictum* in that case, for the Master of the Rolls thought that there was no evidence in support of the allegations in that case. The view of the Court is, that when a solicitor takes upon himself the conduct of a suit by saying that he will indemnify his client against all costs—where the Plaintiff is a mere puppet, and the real party suing is the solicitor—the Court will hold the solicitor liable for all the expenses to which he has put the other parties by his conduct.

Now this case is undoubtedly peculiar, and, to a certain extent, I agree with the Vice-Chancellor in the conclusions at which he arrived. The suit was not originally the suit of Mr. *Jones*, but was instituted through another solicitor. Therefore, while it is the

(1) 1 Russ. & My. 43.

L. C. 1870 *In re* JONES.

duty of every solicitor towards his client as well as towards his opponent to see that frivolous and vexatious suits are not instituted, I do not see that it was part of Mr. *Jones*' duty, there being a suit *in esse*, to say that he would not act, and that the suit being frivolous, he would proceed no further with it, in which case the solicitor would be simply constituting himself the judge between the Plaintiff and the Defendants. But an unfortunate circumstance took place in the suit, which I am quite willing to consider as having happened through a mistake, and thereby the Plaintiff became liable to pay considerable damages. That being so, the Court would not have seen the slightest impropriety, or anything but what was right and fair, on the part of Mr. *Jones* in giving an indemnity to his client against the consequences of his blunder. Mr. *Jones* would probably have been made liable in an action at law as between him and his client, and no one would complain if he had given that indemnity.

But the case here took an entirely different turn:—[His Lordship then commented on the terms of the letter, and the circumstances under which it was written, and came to the conclusion that it related to the costs of the whole suit, and that Mr. *Jones* was to be no longer liable to any consequences whatever in the suit, which was to be left to the solicitor, who was to be the only person answerable in every respect for the suit. His Lordship then continued:—] It is clear that it became from that moment the suit of the solicitor, and came within the principle laid down in *Cockle* v. *Whiting* (1), that the Court cannot allow a suit to go on which is no longer the client's suit, but the solicitor's.

What took place afterwards in the suit seems in every way to agree with the view I take of it.

Upon these grounds, therefore, I think that Mr. *Jones* should be directed to pay the Appellants their costs incurred in this suit as between solicitor and client from the 23rd of September, 1867. The costs will include the costs of this application in the Court below. No costs of the appeal.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *Argles & Rawlins.*

(1) 1 Russ. & My. 43.

DUGDALE *v.* MEADOWS.

L. C.
1870
Dec. 20, 21.

Succession Duty—Sale by Trustees—16 & 17 *Vict. c.* 51, *ss.* 20, 42.

Lands charged with the payment of a jointure were conveyed to the uses of a settlement, the trustees of which had power to sell with the consent of the tenant for life. The trustees agreed to sell a part of the lands, the jointress concurring in the sale:—

Held, that the lands would be sold free from the succession duty payable on the death of the jointress.

Decree of *James*, V.C., affirmed.

BY a settlement made in 1812, certain lands were settled to certain uses, one of which was the payment of a jointure of £1625 to Dame *Anne Bromley*. In 1851 the lands were re-settled, subject to the jointure, power being given to the trustees of the second settlement to sell with the consent of the tenant for life.

In 1864 the trustees, with the consent of the tenant for life and of Dame *Anne Bromley*, who concurred in the sale, agreed to sell a small part of the settled lands. The purchaser objected that the lands sold would, on the death of Dame *Anne Bromley*, be liable to succession duty in respect of her jointure.

The Vice-Chancellor *James* was of opinion that the lands sold would not be subject to the duty, and made a decree for specific performance by the purchaser, as reported (1), where the facts are fully stated.

The purchaser appealed.

Mr. *Eddis*, Q.C., and Mr. *Waller*, for the Appellant:—

When the jointress dies, succession duty will, under sect. 15 of the *Succession Duty Act* (16 & 17 Vict. c. 51), be chargeable upon the land, even in the hands of the purchaser: *Cooper* v. *Trewby* (2). If this was a sale under a power overriding the jointure, the case would be provided for by sect. 42, but here the jointure overrides the whole estate, and the land can only be sold subject to the jointure. If the land remained in the hands of a tenant in fee simple, it would clearly remain subject to succession duty; and what differ-

(1) Law Rep. 9 Eq. 212. (2) 28 Beav. 194.

L. C. 1870 DUGDALE v. MEADOWS.

ence can it make that the tenant in fee simple has thought fit to make a settlement? No dealing of his can affect the succession duty. There are two subject-matters of sale—the land subject to the jointure, and the jointure. The concurrence of the jointress can make no difference. The purchaser is dealing with the jointress and with the trustees, and, in fact, pays the jointress for the jointure and the trustees for the land subject to the jointure. When the jointure falls in, the land, and not the trustees, will have to pay the duty. In order to bring this under sect. 42, the substituted estates in the hands of the trustees ought to be subject to the jointure, but they will not be so. It was argued that the succession could not be provided for, as it would be impossible to say at what rate it would be; but sect. 20 meets that case.

Mr. *Kay*, Q.C., and Mr. *E. W. Byrne*, for the vendors, were not called upon.

LORD HATHERLEY, L.C.:—

I am unable to see any difficulty in this case. The words of the Act are very plain, and there is no reason why they should not receive a simple construction. The word "succession" is to denote any property chargeable with duty under the Act. Now, Lady *Bromley* had a jointure, subject to which the estate was settled on other persons. These settled estates are, with regard to the estate of the jointress, a succession, and the property would, as soon as the jointure terminated, come to the person entitled freed from the jointure. The property chargeable has been sold under the power of sale, a case which has been exactly provided for by the 42nd section. The money will have to be invested, and the jointure will in some way be provided for, as to which there will be no difficulty.

One point raised was, that when the estate has been sold there might be nothing for the Crown to proceed against. But there will always be the money invested, for the parties interested could not hand it over to the tenant for life.

To put any other construction upon the words of the statute would involve a palpable absurdity. The statute intended the duty to be charged upon the property acquired in substitution,

and then the property sold is free from duty, the charge being shifted to the real property bought, or to the money which represents it. With great foresight in those who drew the Act, they saw that it was necessary not only to provide for shifting the charge to the land bought, but also to provide that it should be charged upon the money arising from the sale of the land sold. On the death of the jointress, the persons who derive the benefit will have to bear the burden. The purchaser had a plain course; he has got, under the 42nd section, the land succession duty free, and the money goes to those who will have to pay the duty.

As section 42 stands, the trustees can sell free from duty, the purchaser will take free from duty, and the words cannot be construed in any other way. The appeal must be dismissed with costs.

Solicitors: Mr. *E. Byrne;* Messrs. *Burton, Yeates, & Hart,* for Mr. *Clarke, Melton Mowbray.*

STRAKER *v.* WILSON.

Tenant for Life and Remainderman—Capital—Profits.

A testator gave to his wife a life interest in his one-seventh of a colliery in which he was a partner. By the deed of partnership, the majority in value of the partners had power to dispose of the profits by adding them to the capital or dividing them between the partners or carrying them to the separate accounts of the partners. For several years profits were made, but retained to the credit of a profit-and-loss account. Afterwards profits were divided, but at the death of the tenant for life a large sum remained to the credit of the profit-and-loss account, the greater part of which had been sunk in the works of the colliery:—

Held, that, under the circumstances, the share of the testator in the sum standing to the credit of the profit-and-loss account belonged to the persons entitled in remainder, and not to the executor of the tenant for life.

Order of *James*, V.C., varied.

JOHN STRAKER, by his will, appointed his wife, *Elizabeth Straker*, and three other persons (one of whom renounced) executors of his will, and devised and bequeathed to them all the residue of his real and personal estate upon trust, in the first place, to

L. C. 1871 STRAKER v. WILSON.

pay his debts, and upon further trust that his trustees should manage and carry on the share or shares he should have at the time of his decease in any colliery, railway, or trade, or business, and generally to act in or about the premises as absolutely as he, if living, could have done, and with full power for his trustees by and out either of the capital or annual proceeds of the said trust premises to pay all such sums of money and expenses as his trustees should deem it expedient to pay or incur in the management or carrying on of the said trust premises or otherwise in the execution of the trusts or powers of his said will, to the intent that his trustees might be fully indemnified against any loss which might happen in the execution of the trusts or powers of his said will; and subject and without prejudice to the several trusts aforesaid, upon trust to permit his wife, *Elizabeth Straker*, as from his decease to have and enjoy during her life, she continuing his widow, the said trust premises, or the annual income or profits thereof, of whatsoever tenure, sort, or kind the said premises might be, including a proportion of all annual payments accruing due at his death. And he devised and bequeathed his residuary estate to other persons in the event of her second marriage or death.

John Straker died in 1841, and a suit was instituted in 1847 for the administration of his estate. Part of his estate consisted of one-seventh share in the *Seaton Delaval Colliery*, to which he was entitled under the provisions of a deed of partnership dated the 26th of October, 1838. By that deed *John Straker* and four others agreed to become partners in the *Seaton Delaval Colliery* for thirty-one years. The deed contained many provisions for the management of the business, amongst which were provisions for a yearly settlement of accounts, and also the following:—

"That the property and stock of the company shall be considered as consisting of and divided into seven shares, of which the said *Joseph Lamb* shall be entitled to two, the said *William Wharton Burdon* to two, and each of them, the said *John Straker*, *Thomas Barnes*, and *John Barnes*, to one."

"That upon the said yearly settlement of the accounts, the clear profits of the said partnership concerns, or a portion thereof, if the majority in value of the partners assembled at such meeting as after mentioned shall so direct, shall be added to the joint stock

of the said company, or the same shall be divided between the partners in proportion to their respective shares and interest in the said partnership, and be paid to them respectively, or be passed to their respective separate accounts in the books of the said partnership."

"That the general management of the said partnership concerns, so far as such management shall not be inconsistent with these presents, or any of the clauses herein contained, shall be regulated by the orders and direction, and be subject to the control, of the majority in value of the partners at meetings to be held of the said partners for that purpose; but that, subject to the power of direction and control conferred by this clause, the particular management of the collieries and coal mines, and other concerns of the said company (except the fitting of coals), shall be committed, and it is hereby intrusted to, the said *John Straker*."

The executors continued to be partners in the colliery, and made large advances by way of contributions to capital. The business of the partnership was managed by meetings held as provided by the deed of partnership; resolutions were from time to time duly passed at the meetings, and the accounts were from time to time adopted by the meetings. For some years the business was carried on at a loss. About the year 1850 profits appear to have begun, and in most years profits were made. No resolutions were passed as to the profits. They were not divided, but the sums representing them were in the books carried year after year to the credit of a profit-and-loss account, and were, in fact, employed in increasing the stock, machinery, and new winnings, and in reduction of debts, and for the general purposes of the concern.

In 1866 the partners considered that for the first time there was a disposable balance on hand, and by resolution dated the 30th of June, 1866, they resolved that a dividend of £2000 per share should be declared and paid, and at the same time that the capital account should be adjusted, so as to make each seventh share £20,000.

Large dividends were similarly declared in the following years, and the sum of £2000 in respect of the first dividend, and the subsequent sums so paid, were received by the surviving executor

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of Mr. *Straker*, and were by him paid into Court to the credit of the cause.

On the 31st of December, 1867, the sums standing to the credit of the several partners as capital amounted to £140,000, the sum standing to the credit of the testator's executors being £20,000; and the sum standing to the credit of the profit-and-loss account was £118,835. The actual value of the testator's share in the colliery, including the sum so standing to the credit of the profit-and-loss account, was, however, estimated at £29,000 only, as on the 31st of December, 1867.

Elizabeth Straker, in 1867, presented a Petition for payment out of Court to her of the sums paid as dividends, on which inquiries were directed. She died on the 6th of April, 1868, and the persons entitled in remainder under the will of *John Straker* presented a Petition praying in effect a direction that any further sums paid from the said colliery might be divided between the persons in remainder.

This Petition was opposed by *F. Shaw*, the personal representative of Mrs. *Straker*, who contended that her estate was entitled, not only to the dividends actually paid during her life, but to the testator's share in the sum standing to the credit of the profit-and-loss account.

The Vice-Chancellor *James*, on the hearing of the Petition, and of *Elizabeth Straker's* Petition, which came on with the certificate by the Chief Clerk, was of opinion that the testator's widow was entitled to the whole of the one-seventh share of the profits of the colliery which were ascertained in her lifetime, and to a proportionate part of subsequent profits up to the time of her decease; and made an order for payment to the executors of the sums now in Court, and directed that the deficiency, which the sums in Court would not meet, was to be a charge on the testator's share in the colliery, and declared that his share in the future profits of the colliery ought to be applied in liquidation of that charge (1).

(1) 1870. March 29.

SIR W. M. JAMES, V.C.:—

The main question in this case is, what the widow is entitled to. She was entitled in specie to the profits of this colliery. The testator had, by his partnership deed, given his partners very ample powers with respect to his share in the concern, and he had also given to his executors, by his will, very ample

The persons entitled in remainder appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Hardy*, Q.C., and Mr. *Bagshawe*, for the Appellants :—

We say that everything left in the concern, by whatever name it was called, must be treated as capital. Under the articles the

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powers as to everything he had in this colliery, and every other partnership concern of a like nature. [His Honour then stated the effect of the partnership deed.] Now, up to the death of the testator, no profits were made, and after his death, for a great many years apparently, no profits were made, and in some years there was a loss; they ascertained, year by year, however, the profits and loss, and carried it to a profit-and-loss account on the one side or the other, as the case might be, and they abstained from making any declaration or giving an express direction of any kind whatever. Having regard to the position of the executors and trustees of the testator's will, it seems to me that they rightly and properly abstained from doing so. I think the executors would hardly be justified in joining in a declaration which would have interfered with the rights of the parties between whom they ought to have held an equal hand. No direction was given by the partners to add the interest to the capital. If they had done so, it appears to me, beyond all question, that the tenant for life must have taken the consequences exactly as was determined in the case of *Hartley* v. *Allen* (4 Jur. (N.S.) 500), and the earlier cases, such as *Paris* v. *Paris* (10 Ves. 185).

Now, in this case, as I have said before, there was no direction that this should be capitalised; and when we come to the actual resolutions dealing with it, it appears to me that this is by necessary implication negatived, because, having to deal with the capital, and having to deal with the profits at the same time, they do expressly fix the capital of the testator at the sum of £20,000. That appears to me as strongly as possible to negative any idea that they were exercising their power of converting income into capital. Then, that being so, what did they do? They added the profits year by year, and carried them over to one general account of profit and loss, so that it grew up by degrees from a sum of a few hundred pounds until it amounted to a sum of £118,835 at the end of 1867. In 1866 they began to divide and to carry on their accounts on that footing; they began to make a dividend on account of the aggregate amount of profit. They still carry on the profit-and-loss account, charging what they have paid out, and the ultimate result of it has been that, though in some years there was a loss, a sum of nearly £119,000 has been accumulated. That is the aggregate amount of the profits, and has been so dealt with.

It appears to me you must apply the payments on one side to the earlier items on the other; the partners have so dealt with it, and every payment that has been made up to that time to the partners has been made on account of the profits. That was the mode in which they dealt with the profits—as a thing not to be divided, but as a thing to be kept in suspense until there should be cash in hand to enable them to pay those profits. They said, in effect, that they did not mean to capitalise this

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partners had power either to divide out the profits or to carry them to separate accounts, or to keep them and invest them as capital, and they chose the last course. It is true that no formal resolution on the subject was passed, but the course of proceeding came to that effect, and was continued for many years. The widow was one of the executors, and must have been aware of what was done: *Brander* v. *Brander* (1). Where there are under a will tenant for life and remaindermen, they must take the profits as they are declared, so long as it is all done *bonâ fide*, otherwise a tenant for life might have the concern, goodwill and all, valued every half-year, and insist on having the surplus as profits. *Paris* v. *Paris* (2), *In re Ezekiel Barton's Trust* (3), *In re Maxwell's Trusts* (4), and *Hartley* v. *Allen* (5), are all authorities in our favour. Although the partners have no doubt spent the sums standing in the books, giving the share of the testator as about £37,000, yet the actual value is £29,000 only, and it is absurd to say that £37,000 can be paid out of £29,000. This is not a case of an ordinary partnership. It was to continue for many years, and no one partner could draw out money or claim profits without the consent of the other partners. This was a peculiar business, and the partners were quite right in keeping a large sum to provide against contingencies, even if it is not all invested in the works. It would be contrary to the deed, and might be ruinous to take out money. Could any one partner have at any time filed a bill to have his share of the profits? If a testator leaves property like

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sum, but to take it for the purpose of extending the concern; and whenever they had cash enough in hand they would pay it.

That was a proper thing to do, if they were actually considering what was right and fair towards a tenant for life. It never could have been intended originally that the income of the tenant for life should be taken to extend the works, and that she never should get any benefit from it. No executor would be justified in doing that. Therefore, I am of opinion that the widow was entitled to the whole of the profits that were ascertained in her lifetime, and to the proportion of the subsequent profits; and that everything that has been paid in the shape of dividends on the colliery, whether previously or subsequently, must be attributed to the profit which accrued in her lifetime, unless it is more than enough to cover the sum due.

(1) 4 Ves. 800.

(2) 10 Ibid. 185.

(3) Law Rep. 5 Eq. 238.

(4) 1 H. & M. 610; 9 Jur. (N.S.) 350.

(5) 4 Jur. (N.S.) 500.

this, the only reasonable way of dealing with it is to take what has been done *bonâ fide* as final and conclusive of the rights of all parties. Is the Court to decide what is capital and what is profits, and when the profits ought to have been divided? To decide in favour of the tenant for life would be to go far beyond the case of *In re Maxwell's Trusts* (1).

Mr. *Willcock*, Q.C., and Mr. *Faber*, for the surviving executor of the testator.

Mr. *Kay*, Q.C., and Mr. *G. Williamson*, for the executor of the tenant for life:—

The partners could only apply income as between themselves, and not so as to affect the relative rights of the tenant for life and remaindermen. These profits have not arisen from a mere speculative increase in value, but from actual money received for coal sold, and then invested in the works. They have never been treated as capital, always as profit, subject of course to any losses which might happen. If it was not divided, it must be regarded as an advance made by each partner. It does not appear that all the money has been spent on the works; part of it has clearly been employed in paying debts, and in giving credit. The partners never passed a resolution to carry this sum to capital, but always kept it ready for division as profits. The partners had power at their meetings to determine how the concern was to be managed, and what capital was required, but could not, as between other parties, turn income into capital, even if they had tried. They meant to use the money, and to leave the rights of all other parties unaffected. Even if the present claim is for £37,000, and the value of the share of the colliery is only £29,000, the partners who determined these values knew what they were about, and knew that the works must become depreciated. Besides, the £29,000 is only an estimate, and the colliery may produce much more. *In re Maxwell's Trusts* does not apply, and in the other cases cited there was either a bonus or an addition to capital. The partners agreed to keep this sum as profits, and so it must remain.

Mr. *Higgins*, for other parties.

(1) 1 H. & M. 610; 9 Jur. (N.S.) 350.

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LORD HATHERLEY, L.C.:—

This case must depend upon the articles of partnership. The testator has given his estate to his executors, and they will be in neither a better nor a worse position than he was; and if the executors, one of whom was the widow and tenant for life, chose, as they did, to continue in partnership, I must take it that they were in the same position as the testator. The business was that of a colliery, and the proprietors agreed to an arrangement by which a majority in value of the partners were from time to time to regulate the disposition of the profits, which were not, as in ordinary cases, to be divided, but were either to be employed as capital, or to be divided, or to be retained and placed to the credit of the several partners.

There is no question that the money in dispute was profits, but the question is, what is to be done with such profits; and it seems to me that the Vice-Chancellor has not sufficiently considered this distinction. It does not follow that, because this money was profits, therefore it was to be divided. [His Lordship then read the provisions in the deed as to the profits.]

There is some difficulty as to the construction of the clause, but it is clear that the division was to be made in some way according to the wish of the partners. The executors must have seen in the books how the money had been applied, but they called no meetings on the subject, and am I not to take their proceedings as an acquiescence, and as amounting to a direction that the money should be dealt with as it has been dealt with—neither divided nor carried to the separate account of each, but treated as capital?

It cannot be held that money which was originally profits will, merely because in the books it is called profits, and because there has been no resolution on the subject, be still considered as profits, though dealt with in a different way for many years.

With unfeigned respect for the opinion of the Vice-Chancellor, it does appear to me that he has not paid sufficient attention to the effect of the entries in the books. The partners had powers under their deed, and they approved of the entries; the Court cannot now go back and divide what the partners did not choose to divide, paying to the executors of the tenant for life money which has been invested in expensive works, out of which she has

had the profit. Her executors cannot now claim to have this sum treated as a debt due to them. Any partner who wished to have his money treated as a debt should have said so, and have proposed it, though he would probably have been out-voted, as no doubt the partners would consider it better to leave the money in the concern as capital.

It appears clear that all this money has been spent on the works, and there may be nothing now in hand to meet accidents or losses. No doubt it would be irrational in such a business as this to divide out everything as profits, and to leave nothing to provide against accidents. What they did was this: they raised and sold the coal, and for some time spent all the money on the works, thereby in fact increasing the capital. Then, from time to time, they settled what they would divide and pay out; in fact they divided part, and kept part to provide against contingencies, saying, in effect, that they did not think it prudent to give each partner credit for that part of the profits, which they would retain as capital.

This was a perfectly legitimate mode of proceeding, for it by no means followed that, because profits were made, therefore they were to be divided. The Vice-Chancellor said, that if the partners made no resolution to retain the profits, they must be taken to be divided; but he was influenced by the first resolution as to dividing £2000 a share, and making the capital £20,000 for each share, and he says that they then made a difference between capital and profits. But there is a fallacy in that argument, for though they then said that the capital of each share should be £20,000, they said nothing about the joint capital of the concern. It is true that they kept a profit-and-loss account, but they treated it as capital.

According to the frame of this partnership, there was very little to distinguish it from a joint stock company, for it was to be governed by a majority in value of the partners. This is not the usual rule, but it was the rule here, so that the majority could keep in hand what they pleased, and neither the testator nor his executors could made the other partners pay this money out of the concern, especially when it was all invested in the works. Nor is there any hardship in the case, for the widow has had the profits of the investment.

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The order of the Vice-Chancellor must be varied, and there must be a declaration that the widow's estate is entitled to the money in Court, but that the money invested in the colliery belongs to the estate of the testator.

Solicitors: Messrs. *Van Sandau & Cumming;* Messrs. *Williamson, Hill, & Co.;* Mr. *Crowdy.*

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Feb. 15, 22;
March 8.

6 H.L. 5, 18, 19, 20,

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Charitable Devise—Repairs—Surplus of Rents.

A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Company of Merchant Taylors*, "to this intent and upon this condition," that the Master and Wardens should every year, out of the rents, provide for twelve poor men and twelve poor women of the city of *London* certain garments of a specified price; and he directed the chamberlain and town clerk of the city of *London* to put the company in mind and see that the garments were given; and gave to them for so doing 10*s.* a piece out of the rents; and so that the whole residue of the rents the Master and Wardens should maintain and gather into a stock, and therewith repair, and if need be rebuild the tenements: and in case the Master and Wardens should be remiss and negligent in delivering the said garments, then he willed that the parson, churchwardens, and parishioners of *St. Michael's, Cornhill*, should enter upon the lands and tenements and hold the same, "to this intent and upon this condition," that they should bestow the yearly rents in and upon the garments of the twelve poor men and twelve poor women, and upon the reparation of the tenements, and the said 20*s.* to the chamberlain and town clerk. At the death of the testator the income arising from the tenements was considerably greater than was required for the charitable purposes expressed in the will, and the payment of the 20*s.* to the chamberlain and town clerk; and subsequently the income became very much greater:—

Held, that the *Merchant Taylors' Company* were not entitled to the surplus income for their own benefit, but were bound to apply it to charitable purposes.

Attorney-General v. *Wax Chandlers' Company* (1) distinguished and explained.

Decision of the Master of the Rolls affirmed.

THIS was an appeal from a decision of the Master of the Rolls, who held, on the construction of the will of *Robert Donkyn*, dated

(1) Law Rep. 5 Ch. 503.

December 1, 1570, that the surplus rents of certain houses in the city of *London*, which remained after answering certain charitable purposes and providing for repairs, were given to charitable purposes, and not to the *Merchant Taylors' Company*. The case before the Master of the Rolls is reported (1), where the will is set out at length and the circumstances are fully stated.

Sir *Roundell Palmer*, Q.C., Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for the *Merchant Taylors' Company*:—

We contend, both on the natural construction of the will and on the authority of *Attorney-General* v. *Wax Chandlers' Company* (2), that the surplus rents were intended to be kept by the company. The Master of the Rolls relied upon the fact, that in this case the sum is to be paid out of rents and profits, and also that there are not here, as in that case, *indicia* of any regard by the testator for the company. But the *indicia* are the other way: in that case they took benefits under the will; here they have nothing to compensate them for their trouble, unless they are to have the surplus rents. The question, however, is not what the company takes, but how they take. If the whole rent is exhausted, there would be nothing for the company; if it was not, they took the surplus: *Attorney-General* v. *Corporation of Beverley* (3); *Attorney-General* v. *Skinners' Company* (4); *Attorney-General* v. *Brazenose College* (5); *Attorney-General* v. *Dean and Canons of Windsor* (6).

Moreover, it is clear that the testator took an interest in this company, and meant them to have some benefit. There is no direction that any one else should take any interest in the surplus rents; and to whom would the surplus go if the gift over took place? The mere fact of a gift over assumes that there was something to go over, and not merely the trouble of looking after houses. The *Merchant Taylors' Company* was not a charitable corporation, and there is nothing to shew that the testator intended all his property to go to charitable purposes. There is nothing in this will to deprive the company of the rents after they have done what the testator requires. It makes no difference whether the estate was

(1) Law Rep. 11 Eq. 35.
(2) Ibid. 8 Eq. 452; 5 Ch. 503.
(3) 6 H. L. C. 310. 3 Jur. N. S. 871
(4) 2 Russ. 407.
(5) 2 Cl. & F. 295.
(6) 8 H. L. C. 369. 6 Jur. N. S. 833

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given to a corporation or an individual: *St. Mary Magdalen College* v. *Attorney-General* (1). Moreover, these rents have for 300 years been treated as the property of the company; and the Court, in doubtful cases, always considers that as an argument: *Attorney-General* v. *Mayor of Bristol* (2); *Attorney-General* v. *Corporation of Rochester* (3).

Mr. *Jessel*, Q.C., and Mr. *Wickens*, for the Attorney-General:—

As to the case of the *Wax Chandlers' Company*, the wills are not the same, and the Court cannot take words out of one will and say it will give the same meaning to another will. The gift is to charity. Where there is a trust, it makes no difference whether the estate is given to a corporation or an individual; but there is a great difference where there is no trust, but merely a charge, as then the inference is against any benefit being intended to the corporation. When there is no gift of the surplus, the law disposes of it: *Attorney-General* v. *Corporation of Beverley* (4). As to inducement to the company, the power of administering the property, and of selecting the objects, is quite enough.

Sir *Roundell Palmer*, in reply.

LORD HATHERLEY, L.C.:—

This is an appeal from a decree of the Master of the Rolls, which has in effect declared that the property given by the will of one *Robert Donkyn*, in the year 1570, to the *Merchant Taylors' Company*, is wholly applicable to charitable purposes; and the decree thus appealed from is questioned on the ground that, according to the authority of the *Attorney-General* v. *Wax Chandlers' Company* (5) and the class of cases which that authority professed, at all events, to follow, the property here is given to the *Merchant Taylors' Company*, subject, indeed, to a charge on behalf of the objects which are mentioned in the bequest, but subject only to that charge, and that the remainder is given to the company absolutely and for their own benefit.

(1) 6 H. L. C. 189. (3) 5 D. M. & G. 797.
(2) 2 Jac. & W. 294. (4) 6 Ibid. 256.
(5) Law Rep. 5 Ch. 503.

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I confess that the case has appeared to me to be one of very considerable difficulty. I believe that it does not so appear to the Lords Justices; but I feel that, regard being had to the previous authorities, and especially to the very important *dicta* of Lord *Eldon* in *Attorney-General* v. *Mayor of Bristol* (1), sanctioned and expanded as those *dicta* have been by Lord *St. Leonards* in the case of *Mayor of Southmolton* v. *Attorney-General* (2), it has become a matter of considerable difficulty to know where the precise line is to be drawn with reference to bequests of this date and character. The real point to be ascertained is easy enough to define, but the application of any definition which may be given to the particular case before the Court is always the great difficulty.

Now, I apprehend the rule is very simple and plain, that if an out-and-out devise or gift is made to the persons who are the immediate objects of the devise or gift, subject only to a charge for certain specified objects, then the devise or gift stands good, and the charge only has to be carried into effect. On the other hand, if trust and trust only is the object of the testator, then whether there be a positive gift to the particular objects who are to receive a benefit out of the property so devised, or there be simply a direction generally as to trust, and trusts are declared which do not exhaust the whole estate, still the trust remains, and there is then a resulting trust to the heir of the devisor or grantor; and if not, then the question arises under the general rule, whether the charities are not entitled to have the whole of the estate not specifically disposed of for the purpose of increasing the gift to the general objects of the charity, which is in that case supposed to have been the testator's paramount intention.

Among the authorities which are not cases of charity, *King* v. *Denison* (3) and *Dawson* v. *Clarke* (4) are well known. *Dawson* v. *Clarke* was a very remarkable case, because the property was chargeable and on a trust; and it was held ultimately to be a charge and not a trust. It has been found that there are cases of extreme difficulty bordering on the line, just as there are cases of charity of extreme difficulty bordering on the line.

With regard to charities, a rule has been laid down by Lord

(1) 2 Jac. & W. 294.
(2) 5 H. L. C. 1.
(3) 1 V. & B. 260.
(4) 18 Ves. 247.

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Eldon in *Attorney-General* v. *Mayor of Bristol* (1), and somewhat expanded by Lord *St. Leonards* in *Mayor of Southmolton* v. *Attorney-General* (2), that where a gift has been made to a corporate body, and there is *de facto* a surplus, and nothing whatever has been said about residue or surplus, then the corporate body takes the gift, subject only to the charges; or, in other words, there is not a resulting trust for the donor.

Now, in the case of *Attorney-General* v. *Wax Chandlers' Company* (3), there were certainly features differing materially from those of the case before us. In the first place, there was what I think may be called an absolute charge upon the property; and, further, in the event of a breach of duty on the part of the first takers, a gift over to a person individually there named, who evidently was intended, subject to the charge, to take for his own benefit; and therefore there was an inference that the interest, subject to the charge, was a beneficial interest in the first takers, from whom it was to go over. And further, there was a direction to pay the residue of the rents towards repairs, it being perfectly clear in that case that the testator could have no conception whatever of what the residue of the rents would be. What he meant was, that the company should take the property, and that it should not be allowed to go out of repair; but subject to that, the company would take the property. But here the almshouse itself is given to the inmates, the payments are to be made to them, the property is to be occupied by them; it is to be for them, and the whole property is given to them. I was, I think, pressed then, as we have been pressed upon the present occasion, with a *dictum* of Lord Justice *Turner* in *Attorney-General* v. *Mayor of Beverley* (4), that he believed, although he knew of no authority to that effect, that if the portion of rents and profits not given to the charity be devoted to the payment of burdens, which the charity would otherwise have to bear, that property is given to the charity. I cannot thoroughly agree with him that it is given to the charity. As far as it is given, of course it is so; but if it be meant to say that the whole property is given to the charity, because it is to be applied in satisfaction of a charge, I humbly venture to differ from

(1) 2 Jac. & W. 294.
(2) 5 H. L. C. 1.
(3) Law Rep. 5 Ch. 503.
(4) 6 D. M. & G. 265.

him, and to say that it is varying the whole distinction which has heretofore been made between charge and trust; and if it be only a charge upon a certain amount of lands to pay off certain other charges upon the charity, I apprehend that when those other charges have been paid, the gift, whatever it is, would be the subject of a resulting trust.

Having said so much, I think that I have quite sufficiently explained the reason for my feeling great doubt and hesitation in this particular case. I think that it is one of very great nicety; but, upon the whole, I am not inclined, nor am I strongly enough pressed by the contrary construction—regard being had not only to the decision of the Master of the Rolls, but to the views of both my learned colleagues—to say that the decision of the Master of the Rolls is erroneous. The difference between the present case and that of *Attorney-General* v. *Wax Chandlers' Company* (1) is not, to my mind, so clear and satisfactory as any one, having to decide the case upon a difficult will, would desire it to be. We must do the best we can upon the testator's expressions, and the matter would not have come here if they were easy to construe.

[His Lordship then referred to the terms of the will.]

Now, the difference is this: It is not merely said in an off-hand way, as in the other case, but we undoubtedly have here a very definite bequest (which the Attorney-General could at any time have enforced) to accumulate anything over and above what was wanted for the immediate repairs. It is not to be spent, but it is to form a fund for the purpose of repairs, and of rebuilding these premises. And, further than that, if the *Merchant Taylors' Company* do not do what is here required, there is a gift over—not, as in the former case, to a person who was to take beneficially, subject to the performance of the particular trust, but to persons who are only to take for a distinct and separate charitable purpose. I quite allow the force of Sir *Roundell Palmer's* argument upon that point of the case, in which he said, that the fact of the property being given over to another corporation does not shew that there was any intention to give any more to the people who were to have the gowns, or to augment their number; but, at the same time, the whole question upon the will is, whether the testator intended a resulting

(1) Law Rep. 5 Ch. 503.

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trust. That, I think, he clearly did not, nor did he intend an out-and-out gift to the persons who were to take subject only to a charge. Looking, therefore, to the right which the Attorney-General would have had to keep this fund accumulated for contingencies, and looking to the gift over in case the poor men and poor women were not provided for, I come with considerable hesitation to the conclusion that there is enough upon this will to shew that the testator did not intend a benefit to the company; and if he did not intend a benefit to the company, I certainly think that there is no question that he did not intend a resulting trust; and therefore the only alternative is, that all the property should be given to charity.

SIR W. M. JAMES, L.J.:—

I also am of opinion that the decision of the Master of the Rolls ought to be affirmed.

It is possible that during the many years in which I acted as counsel for the Attorney-General in charity cases, and had to advise on such documents as that before us, and to consider the authorities bearing on their construction, I may have unconsciously acquired a bias in favour of the claims of charities. But, making every allowance for that possible bias, I feel that I should have been exceedingly startled if the decision of His Lordship had been other than it is.

To my mind, the only thing we have to deal with is the meaning of the testator's words in this particular instrument; and it is to me clear that the plain, natural, ordinary grammatical construction of these words is so free from all ambiguity and doubt as not to require, and not to admit of, any assistance or control from the authority of cases decided on the construction of any other will or instrument.

As a general rule of law, it is clear that where there is a gift to trustees merely as trustees, they cannot take any benefit arising from the fact that the expressed trusts do not, whether originally or from any subsequent event, exhaust the whole estate. In ordinary trusts the results are, that there is an implied trust for the donor's heirs or representatives. In most cases of gifts for charitable purposes there is an implied trust for charity.

But there is a class of cases—not confined or peculiar, as it seems to me, to gifts to colleges, municipal corporations, or city guilds—in which it is a fairly moot question whether, in a gift of property to trustees, they take as trustees solely for the purposes of the trusts, or take subject only to the due execution of the specified trusts. And, in considering that question where it fairly arises, every surrounding circumstance, the character and position of the donor and donee, the more or less probability of one intention or another, the current of authorities in similar, or nearly similar, cases, are all matters which the Court of construction not only may, but must, look to for aid and guidance.

But where the testator or donor has in express words directed the whole of the property, or the whole of the rents and profits, to go to purposes which exclude all beneficial interest in the donee, and his words are not controlled or interpreted by plain implication arising from other parts of the same instruments, there is, in my judgment, no legitimate power in any Court of construction to resort to the surrounding circumstances, or to the character or position of the parties, or to the probability of intention, or the current of authority, or to do anything but give effect to the very words.

This is, in my opinion, the case with the present will. The gift is of a large number of small houses in the City, upon trust, out of the rents and profits, to make certain specified gifts to certain charitable objects, and proceeds thus:—[His Lordship read from the will the gift of the residue.] It seems to me, that if ever there was a plain gift to trustees solely for the purposes of the trust, and in terms excluding any beneficial interest in the trustees, this is such a gift.

It was contended—but I am afraid that I was unable rightly to apprehend the argument—that, independently of those words as to repairs, and omitting those words, there would have been a gift to the company, subject only to the performance of the charitable obligations; and that, starting with that, those words are idle and superfluous, as they merely direct an owner in fee simple of house property to provide a fund for the proper reparation and maintenance of his own property.

You may do anything with any instrument in that way. Omit certain words and then arrive at the conclusion, and then deal with

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the omitted words, being bound by the conclusion you have arrived at by their omission.

But can it be with any reason contended that the testator's intention was, by these words, to give such idle and superfluous directions? Did he or did he not, so far as intention goes, intend an obligation, which it was incumbent on his devisee to perform, to accumulate the surplus, the whole surplus. I cannot doubt that he did so intend; and if there was an obligation intended by the testator, and expressed by him as an obligation extending to the whole surplus, then the obligation and the trust extended at the first, and from the first, to the whole rents and profits of the property, so as to exclude any beneficial interest in the devisee. And for whose benefit was that obligation as to the surplus intended? Plainly, as it seems to me, for the benefit of the charity. The property being house property—cottage property, in fact, bringing in a rental of about 30*s.* a house and garden—it is reasonably certain that it would require considerable repairs, and would be liable to the then not uncommon peril of fire at a time when insurance against fire was unknown; and the direction to accumulate the whole surplus into one stock for the purposes of reparation and rebuilding, as occasion should require, was obviously a provision to secure against all contingencies for the charitable objects the bounty intended for them, and was therefore a devotion of the whole surplus for the benefit of those charitable objects. It was simply what in commercial companies is known as a depreciation and reserve fund. I cannot myself doubt that if, upon or after a testator's death, in any similar gift at this day the devisee were to spend the surplus instead of accumulating it, the Attorney-General would obtain from this Court, on behalf of the charity, a proper decree for the execution of the trusts, whether the devisee were an individual, a municipal corporation, or a City company.

It was said, indeed, that it could never have been intended by the testator that any surplus, however large, was to be expended in unnecessarily expensive repairs or reconstruction. The answer to that is, that the testator never supposed that there would be any large surplus; to him, house property producing £26 a year represented £26 a year: he no more dreamt, on the one hand, of the change in the value of money, and in the value of houses and

land in *London*, than he dreamt of the whole property being swallowed up by an earthquake, or the corporation itself being destroyed by some revolutionary measure.

He was making a moderate and reasonable provision for the security of his charity by devoting the surplus, and the whole surplus, to a reserve fund. The fact that that surplus, centuries after his death, has grown to its present amount, no more entitles the company to it than in the case of there being a clear gift to the company of a surplus, supposed by the testator to be small, it would have deprived them of any portion of such surplus. It is the very case to which the doctrine of *cy-près* applies.

In the view which I take of this case, therefore, it is not necessary that I should refer in detail to the authorities which have been cited.

I think I may, however, properly refer to *Attorney-General* v. *Mayor of Bristol* (1), and the case of *Attorney-General* v. *Wax Chandlers' Company* (2), both of which I take to be authorities in favour of the decision of the Master of the Rolls. In the *Bristol Case*, the then Master of the Rolls came to the conclusion that he might imply the words found in this will, and proceeded to decide accordingly in favour of the charity; and it is reasonably probable that if there had been such express words, Lord *Eldon's* subsequent elaborate examination of every clause and word in the instrument would not have induced him to depart from the decision of the Master of the Rolls.

In that case there were introductory words: "And for no other end, intent, or purpose"—which, it was contended, threw such a difficulty in the way of the construction ultimately arrived at as to shew to what length this Court has gone in favour of corporation devisees. Now the danger forcibly pointed out by Mr. *Jessel*, of making the decision as to one instrument into a canon of construction for the interpretation of another, is strikingly illustrated by those words, and the argument deduced from them—for to me those words are about the strongest thing in the whole document in favour of the *Bristol Corporation*. The donor said: "I give you the property; there are certain trusts which you are to perform—and I have no other trust, intent, or purpose whatever in view; there

(1) 2 Jac. & W. 294. (2) Law Rep. 5 Ch. 503.

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is to be no implied trust, no resulting trust, and if you do the things which I have told you to do, and nothing more, you will fulfil every obligation which I mean to impose on you."

As to the case of *Attorney-General* v. *Wax Chandlers' Company* (1), it is enough to say that the learned Judge who first decided that case, also decided the case under appeal; and he has told us that he decided it on the very special context and very special circumstances in that case—that his *ratio decidendi* was, in fact, on the things which constitute the differences between that will and the present; and I do not think that there was any substantial distinction between the two judgments in that case. The Court was enabled or compelled, by the context and the surrounding circumstances, to put what I humbly conceive to be a somewhat strained and non-natural meaning on the residuary clause in that will. If, in the total absence of any such context and of any such surrounding circumstances, the Court were to extend the construction to the will under consideration, it would be, in my judgment, to lay down not a canon of construction, but a positive rule of law, that in cases of gifts to City companies upon expressed trusts exhausting the whole income, if one of such expressed trusts is of the surplus for the reparation and rebuilding of the property, such trusts shall in all cases be read as if it were a gift of the surplus to such companies for their own use and benefit.

In my judgment, it is beyond the province of a Court of construction to lay down any such rule of law.

SIR G. MELLISH, L.J.:—

This case appears to me to depend entirely upon the question whether, according to the true construction of the will of *Robert Donkyn*, his lands, tenements, and gardens, in the parish of *St. Botolph*, are devised to the *Merchant Taylors' Company* beneficially, subject to the charge of having to fulfil certain charitable objects and repairing, and from time to time rebuilding the premises, in which case the surplus profits would belong entirely to them, or the lands, tenements, and gardens are devised to them upon trust to apply the whole of the existing net profits of the lands to

(1) Law Rep. 5 Ch. 503.

charitable purposes, in which case, according to the well-known rule established by the *Thetford School Case* (1), the whole of the surplus rents will belong to the charity.

Now, I am of opinion, after considering the whole of the testator's will, that he intended to devote all the property devised by it to charitable purposes. The property consisted principally of houses, and it was obvious that a portion of the rents must be reserved for repairs and rebuilding, and the testator seems to me to have calculated how much of the rents he could safely devote to charitable purposes, so as to have a sufficient residue for repairs and rebuilding. The language of each of the devises seems to me directly to negative any intention on the part of the testator to leave any residue for the benefit of his trustees. In the first devise of a house to the parson and churchwardens of the parish of *St. Michael* in *Cornhill* the words are, "and the whole rest of the rent I will shall be reserved to the maintenance of the reparations of the said house." In the devise in question the words are, "and so that the whole residue of the said rents and profits of the said lands, tenements, and gardens, they do maintain, and gather yearly into a whole stock, and therewith do and keep the reparations of the said tenements to them devised, and if need be new build the same as to their discretions need shall appear, as the same stock will fall out;" and in the gift over of the same property to the parson, churchwardens, and parishioners of *St. Michael* in *Cornhill*, the gift is expressed to be made "to this intent and upon condition that they the said churchwardens and their successors shall bestow the yearly rents and profits," which must mean the whole of the rents and profits, "of the said lands, tenements, and gardens in and upon" the charitable purposes specified, "and upon the reparations of the same tenements and gardens."

The question seems to be, Did the testator really mean what he has said, that the whole residue of the rents should be thrown into a common fund, and applied to the repairing and rebuilding of the premises devised, and that, therefore, no part of it should go to the *Merchant Taylors' Company;* or is that construction so absurd that the testator could not have meant that the whole residue should go into a repairing and rebuilding fund, but that he

(1) 8 Rep. 130 b.

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must have meant, what he has certainly not said, that so much of the residue as was wanted for repairs and rebuilding should be applied for that purpose, and that the rest should belong to the *Merchant Taylors' Company*. I cannot see that any such absurdity is involved in giving its natural construction to the language of the testator as to justify the Court in departing from it. There is nothing to prove that at the time when the will was made the surplus rents, after providing for the charitable objects, formed more than a sufficient fund for the repairs and rebuilding, and the *Thetford School Case* (1), and numerous other cases, prove that founders of charities, about the time when this will was made, acted upon the assumption that rents of land would remain at the same amount at which they were in their time.

Indeed, the present testator seems to have thought that a penny would always buy a loaf of the same size it did in his time, that Welsh frieze would always be of the price of 16*d.* the yard, and poor men's shoes at 12*d.* a pair. Perhaps, indeed, the testator thought it enough to provide a scheme for carrying out his charitable objects so long as prices and rents remained the same, and supposed that, if prices and rents altered, his trustees would have power to alter the details of his scheme so as to carry out his general object; but, however this may be, I am of opinion that, according to the true construction of the will, no benefit was given to, and no burden cast upon, the *Merchant Taylors' Company* by the devise in question, and that therefore the judgment of the Master of the Rolls ought to be affirmed.

Solicitors: Mr. *S. Fisher;* Messrs. *Raven & Bradley.*

(1) 8 Rep. 130 b.

In re INTERNATIONAL CONTRACT COMPANY.

PICKERING'S CLAIM.

L. JJ.
1871
April 21.

Contract with Agent of Company—Deed under Seal—Claim in Winding-up.

The managing director of a company, who had power to enter into contracts on behalf of the company, and was bound to give the company the benefit of all such contracts, entered into an agreement with *P.*, by which, in consideration of certain assignments, he bound himself to pay *P.* a sum of money. No mention was made of the company in the deed, but the directors took part in the negotiation, and *P.* was aware that the agreement was made on behalf, and for the benefit, of the company. The company paid money to *P.* on account of the contract, and was afterwards ordered to be wound up:—

Held (affirming the decision of *Stuart*, V.C.), that *P.* could not claim against the company under the contract.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, disallowing a claim of *Joseph Pickering*, in the winding up of the *International Contract Company, Limited.*

Joseph Pickering and his brother, *Edward Pickering*, separately carried on the business of contractors for public works. Prior to the year 1865, *Edward Pickering* sold his business to the *International Contract Company*, of which he became the managing director, for the sum of £150,000, and he at the same time entered into an agreement with the company whereby he undertook not to carry on any works on his own account for a term of twenty years, and to give the company the benefit of all contracts which he might make. By the articles of association, *Edward Pickering*, as managing director, had power to enter into contracts on behalf of the company.

In the year 1865 *Joseph Pickering* became the owner of two concessions granted by the Peruvian Government for the construction of two railways in *Peru.*

By two agreements under seal, dated the 17th of February, 1865, *Joseph Pickering* assigned these two concessions to his brother *Edward Pickering* for a consideration amounting in money and shares to £302,000. There were no parties to the deeds, except *Joseph* and *Edward Pickering*, and it did not appear on the deeds that *Edward Pickering* was acting on behalf of the *Inter-*

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national Contract Company. It was, however, proved that the negotiation for the assignments between *Joseph* and *Edward Pickering* was in great part conducted in the presence of several directors of the company, who, however, left before its conclusion, and that *Joseph Pickering* was informed by *Edward*, before the execution of the agreements, that he (*Edward Pickering*) was acting on behalf of the company, and not in his individual capacity.

In August, 1865, the *International Contract Company* paid *Joseph Pickering* £10,000 as part of his claim, whereby the amount due to him under the agreements was reduced to £292,000.

In July, 1866, an order was made for the winding up of the company, and *Joseph Pickering* carried in a claim for £292,000. The Vice-Chancellor rejected the claim altogether; and from this decision *Joseph Pickering* appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Leeson*, for the Appellant, contended that the Appellant had dealt with *Edward Pickering* as a trustee for the company, and that, although the deeds were under seal, yet in equity the substance rather than the form of the transaction would be regarded, and the Appellant could hold the company liable. If the company were still going on, they might have taken the benefit of the agreement as against the Appellant.

The LORD JUSTICE MELLISH:—The deed being under seal, the Appellant has elected to charge *Edward Pickering* alone. If a lessee assigns the lease to a trustee for a third party, and the trustee covenants with the assignor to indemnify him, the assignor has accepted the trustee as the party liable, and cannot sue the *cestui que trust.*

Sir *J. B. Karslake*, Q.C., Mr. *Hardy*, Q.C., Mr. *Higgins*, and Mr. *Arnold Lewis* (of the Common Law Bar), for the official liquidator, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Appellant's case entirely fails. I think the case put by the Lord Justice is precisely in point. There is an assignment of property to a trustee, who enters into cove-

nants with an assignor. In such a case the assignor has no equity to proceed against the *cestui que trust*. The appeal must be dismissed with costs.

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SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Allen, Colley, & Edwards.*
Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, & Longden.*

LEE *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

L. JJ. 1871 *April* 18, 19.

Receipt in full for all Demands—Estoppel—Release.

A passenger, who was injured by a railway accident, sent in a claim for £691 compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted £400, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that the Plaintiff had accepted £400 in full satisfaction and discharge of the causes of action. The Plaintiff filed his bill to restrain them from relying on the plea, and from setting up the acceptance of the £400 or the receipt as a satisfaction or discharge of the damages, except to the extent of £400. The bill did not allege fraud, but that the Plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time:—

Held (reversing the decision of *Malins*, V.C.), that, as the statement in the receipt could be rebutted by evidence that the Plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity; and that the bill ought to be dismissed.

Stewart v. *Great Western Railway Company* (1) distinguished.

THIS was an appeal by the *Lancashire and Yorkshire Railway Company* from a decree of Vice-Chancellor *Malins*.

The Plaintiff was a civil engineer, and the inventor of several patented inventions. On the 25th of September, 1865, he was travelling on the *Lancashire and Yorkshire Railway*, when a collision occurred, from which he suffered serious injury. He was taken to an hotel at *Manchester*, where he was attended by

(1) 2 D. J. & S. 319.

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Dr. *Clayton*, who appeared to have been called in as the nearest medical man; by Dr. *Midwood*, an attendant medical officer of the company; and by Dr. *Sanford*, who was called in by the Plaintiff himself. On the 11th of October, 1865, the Plaintiff, after consulting with his medical attendants as to his prospects of recovery, sent in a claim for compensation, very carefully and fully drawn out, the sum claimed being £691. On the 17th of October, Mr. *Blackmore*, the passenger traffic manager at *Manchester*, in company with Dr. *Midwood*, called on the Plaintiff to discuss the amount of his claim; and it was agreed that the company should pay the Plaintiff £400 and all the medical bills in relation to the accident. On the 18th of October, 1865, Mr. *Blackmore*, on behalf of the company, paid the £400 to the Plaintiff, and took a receipt in the following form :—

"Mr. *Lee's* Claim.

"*Lancashire and Yorkshire Railway,*

"*Manchester*, October 18th, 1865.

"*Thomas Vincent Lee* v. *Lancashire and Yorkshire Railway Company.*

"Received from the *Lancashire and Yorkshire Railway Company* the sum of £400, in discharge of my claim in full upon that company for all loss sustained and expenses incurred by the late accident at *Miles Platting*, September 25th, 1865, including all expenses attending the same.

"*Thos. Vincent Lee.*"

On the 6th of November, 1866, the Plaintiff, on the ground that his injuries were more serious and permanent than had been supposed, commenced an action against the company for damages, and claimed £3000. The company, in December, 1866, put in two pleas: 1. Not guilty. 2. That after the accruing of the causes of action in the declaration mentioned, and before action brought, they delivered to the Plaintiff, and the Plaintiff accepted and received from them, the sum of £400, in full satisfaction and discharge of the said causes of action and every part thereof.

The Plaintiff, in 1867, filed his bill, alleging to the effect that the injuries he had received were so serious and permanent as to make £400, which he had accepted on the faith of the statements of the

medical men that he would recover in three or four months, a very inadequate compensation; but the bill did not allege that the advice thus given by the medical men was fraudulently given.

It then, by paragraphs 11, 13, and 14, stated to the following effect:—11. On the 17th of October, Mr. *Blackmore* and Dr. *Midwood* called on the Plaintiff, and Dr. *Midwood* stated that the Plaintiff's case had been considered by the company, and that as the medical men considered that the Plaintiff would soon be quite well, the company offered him £400, and the Plaintiff, relying on the accuracy of the statements of the medical men, expressed his willingness to accept it. 13. On the 18th of October, Mr. *Blackmore* called on the Plaintiff and produced a printed form of receipt, which he handed to the Plaintiff for his perusal, and asked whether he would sign it. The Plaintiff having read the receipt, replied that he saw no reason why he should not sign it, on the assurance of the medical men that his injuries were only temporary, and that three or four months would, in their opinion, be the outside before he was able to get about as well as ever. The Plaintiff then asked Mr. *Blackmore* whether, in the event of his death, his signing the receipt would prevent his widow obtaining adequate compensation from the company, and whether, if he was more seriously injured than the doctors had stated, it would prevent his obtaining proper and additional compensation from the company, to which Mr. *Blackmore* replied in the negative, and said that the form proposed was one the company always got signed on such occasions. 14. "The Plaintiff thereupon agreed with the Defendant *H. Blackmore,* as the agent of the Defendants, the said railway company, to sign the said receipt, on the express condition that he should not thereby exclude himself from further compensation if his injuries eventually turned out to be more serious than was then anticipated;" and he accordingly signed the receipt, and received a cheque for £400.

The bill further stated that the Plaintiff had not replied to the plea, because he was advised that it was a complete defence at law, and charged "that under the circumstances it is inequitable that the said company should avail themselves of the said payment of £400, and the receipt given for that sum, as a satisfaction and discharge of the said causes of action, and that such a defence to the

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said action would be a fraud on the Plaintiff, and that the said company ought to be restrained from raising or relying upon such defence." The Plaintiff also insisted that the £400 ought not to be treated as satisfaction, but only as part payment. The bill prayed that it might be declared that the receipt ought to stand as a receipt only for £400, and that such sum was not, under the circumstances, and was not accepted by the Plaintiff as, a proper satisfaction of the claims of the Plaintiff; that the company might be restrained by injunction from relying on their second plea at the trial of the action, and from in any manner setting up or relying upon the said payment or acceptance of the £400, or on the receipt or acknowledgment given for such sum, as a satisfaction and discharge of the damages claimed by the Plaintiff, except to the extent of £400; and that, if it should be deemed expedient, an inquiry might be directed for ascertaining the proper amount of compensation.

Vice-Chancellor *Malins* made a decree containing a declaration, and granting an injunction, in the terms of the declaration and injunction asked for by the prayer, and ordering the Defendants to pay the costs.

Mr. *Cole*, Q.C., and Mr. *Ince*, for the company, in support of the appeal.

Mr. *Glasse*, Q.C., and Mr. *Methold*, for the Plaintiff, referred to *Stewart* v. *Great Western Railway Company* (1), *Traill* v. *Baring* (2), and *Gordon* v. *Gordon* (3).

SIR W. M. JAMES, L.J.:—

This case appears to me entirely different from *Stewart* v. *Great Western Railway Company*, where, while a poor man was lying suffering from an accident, persons went to him on behalf of the railway company, and induced him to accept a small and almost nominal sum in full of all demands, making false representations to him as to the medical opinions which had been given about his state. That was a case where a directly fraudulent and false

(1) 2 D. J. & S. 319. (2) 12 W. R. 334, 678.
(3) 3 Sw. 400.

statement was made to the man to induce him to enter into the arrangement, and under those circumstances it appears to me to be of course that this Court should not relinquish its jurisdiction to deal with a case of fraud, but should say that the company was not to be entitled to use at all, for any purpose or under any circumstances, the document which had been obtained in that way.

The Plaintiff in the present case was a gentleman of education and skill, a person fully capable, unless weakened by illness or accident, of taking care of himself and understanding what was done. After the accident had occurred on the 25th of September, Dr. *Clayton*, who was not in any way connected with the railway company, but was called in by the railway officials as the nearest doctor who could be found, appears to have attended him sedulously for several days. The railway company instructed a medical man, who was one of their regular staff, to go and see the patient with Mr. *Clayton*. He does so, consults with Mr. *Clayton*, and gives his advice. Not satisfied with that, the Plaintiff sends for another doctor at *Macclesfield*, who had been the medical attendant of some of his relatives. The Plaintiff asks these medical men their opinion as to his state, and the chances of his recovery, and they gave him, as they say, the best advice they could. After this, on the 11th of October, he sends in to the company a claim for damages to the amount of £691, very skilfully and carefully drawn up, and shewing, I think, on the face of it, that he either had very able assistance in preparing it, or was himself so able as not to require any assistance in a transaction of this nature. Now, if the company had immediately said: "We will pay you the £691," nothing whatever could have been urged against them. The proposal did not come from them. They did not take advantage of the Plaintiff's position to make him an offer, but the proposal came from him: "Pay me £691, and there will be an end of it." That proposal having been considered at a meeting of the directors, they sent their traffic manager and their doctor to the Plaintiff, and a conversation took place, the result of which was that the amount of the compensation is fixed between them at £400 and the doctor's bill, amounting in all to about £450. I have not been able to find any trace of evidence that the directors, or their

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officials, did anything other than what honest and honourable men would do in a transaction of this kind. In truth, the bill (though the Vice-Chancellor appears to have overlooked the fact) does not allege that any fraud was practised by or on behalf of the company in respect to what took place before the agreement was made. The bill nowhere charges that the doctors ever made a false representation, or were guilty of any concealment, and the doctors themselves all swear that they throughout gave the Plaintiff their advice and opinion to the best of their judgment.

There is, therefore, no analogy between the circumstances of this case and those of *Stewart* v. *Great Western Railway Company* (1). In truth, when we come to consider what case is made by the bill, it does not allege that this gentleman was induced by any fraudulent practice by the company, or the company's agents, to enter into the accord and satisfaction they have set up. His case is: "I never entered into such an agreement as that. I entered into an agreement much more advantageous for myself. They offered me £400, and I said that the £400 was only to be received in respect of the injuries then known, and that I was to have a further right against the company if it turned out that I was more seriously injured." The case made by the bill is contained in the 14th paragraph. [His Lordship read it.] That is an allegation of an actual agreement that the Plaintiff should not exclude himself from further compensation, and therefore any notion of any misconduct on the part of the doctors, or on the part of the railway company through the doctors, towards this gentleman, is entirely out of the question. The only equity raised by the bill is, that the agent of the company agreed with the Plaintiff that he should not be excluded from further compensation. It is quite clear that the company could not be bound by any such agreement, for Mr. *Blackmore* was not the agent of the company to do anything more than to take the receipt in full for the sum of money which he was carrying to the Plaintiff.

Of course, it might be open to the Plaintiff to say that if the receipt does exclude him from further compensation, then he has a right to have it set aside, because he gave it under a mistake, produced by the representations of the company's agent, who

(1) 2 D. J. & S. 319.

stated that it would not so exclude him. The Plaintiff, however, was not disposed to rely on that equity, because he could get no relief in this Court on that ground, except on the terms of giving back the £400, and being put exactly in the same position as he was in when the transaction was completed.

Is there, on the Plaintiff's own shewing, any necessity for coming into equity to get rid of the receipt? The having given it does not estop the Plaintiff from saying that there was no accord and no satisfaction, and it therefore appears to me that the whole of the case could be sufficiently dealt with by a jury, and far more properly and far more satisfactorily disposed of by a jury upon an examination of the witnesses than it can be in this Court. And I am bound to say this, that if I were compelled to come to a conclusion here, I should not be satisfied upon the evidence which has been produced, that the Plaintiff's mind did not go with that document, meaning it to be what it purports to be, a satisfaction in full of his claim upon the company for all loss sustained by the accident, including all expenses attending the same. I am of opinion that the decision ought to be reversed, and the bill dismissed with costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion. This appears to me to be a most unfortunate and a most unnecessary litigation. The original cause of dispute was that the Plaintiff, through the negligence of the Defendants' servants, met with an accident. That of course was a cause of action, one of a description with which the Courts of Law are very familiar, and which ought to be left as far as possible to those Courts. But the Plaintiff alleges that before he can properly try his case in a Court of Law, the plea which has been set up ought to be set aside, that plea being in form a common plea of payment and receipt of a sum of money in satisfaction of the Plaintiff's claim. He alleges, as I understand his bill, that that plea is an answer to his case at law, for the 29th paragraph of the bill states: "The Plaintiff has not yet replied to the plea, because he is advised that such plea is a full and complete answer at law to the Plaintiff's cause of action." I am of opinion that, if he received such advice, it was wrong advice, and that if the circum-

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stances stated in his bill are correct, he had a full and complete answer at law to this plea; and it appears to me that the supposition that it is necessary to come into a Court of Equity for the purpose of setting aside the plea is founded on a total mistake as to what is the effect at law of signing a receipt. I had some little doubt in the course of the argument whether it might not be said that this document amounted to an agreement, in which case no doubt the rule of law would apply that if the parties had reduced their agreement into writing they could not vary the terms of that agreement by parol evidence; but on looking at the document, I am convinced it is simply a receipt. It simply states a fact—it does not state an agreement or purport to bind either of the parties to any terms whatever; it simply acknowledges that a sum of money was received, and then states in respect of what it was received, viz., in satisfaction of the damages the Plaintiff had sustained in the collision. Then the Plaintiff says: "True, I signed that receipt, but I asked the agent of the company in plain terms before I signed it, 'Will this receipt prevent my recovering further damages if the doctors' opinion turns out to be wrong, and I don't get well,' and the company's agent told me that it would not, and I signed the receipt on the faith of that." I am clearly of opinion that, if that statement is shewn to the satisfaction of the jury to be true, the Plaintiff, without setting up any case of fraud, must succeed in his action on a replication merely traversing the plea, and thus denying that he had received the money in satisfaction and discharge of the damage sustained. Where a release has been given under seal, that release discharges the cause of action altgether, and it can only be set aside in a Court of Law under what is called the equitable jurisdiction, which, in certain circumstances, Courts of Law can exercise. A receipt not under seal has no such effect, but amounts simply to an acknowledgment, and has the same effect as if a man had written a letter saying that he had received a sum of money in satisfaction, or as if in the course of conversation he had mentioned he had received it in satisfaction—it is merely evidence of satisfaction, and liable to be rebutted by contrary evidence.

I will shortly refer to the cases which shew beyond all question that a receipt is only evidence, and is not binding or conclusive.

In *Skaife* v. *Jackson* (1) the marginal note is: "In assumpsit by two co-trustees for money had and received to their use, the Defendant produced a receipt for the money given by one of the Plaintiffs:—*Held*, that this was not conclusive, and that evidence was properly admitted to shew that the giving of the receipt was a fraudulent transaction, and that the money had not been paid." *Abbott*, C.J., says: "I am of opinion that we ought not to grant a rule in this case. The receipt was not a discharge of the action, nor was it pleadable in bar; but a release is, and, although fraudulent, a Court of Law can only avoid it by equitable interference. A receipt is very different, and is nothing more than a *primâ facie* acknowledgment that the money has been paid." That was followed by *Graves* v. *Key* (2). That was an action on a bill of exchange, and there was indorsed on the bill a receipt that the full amount had been paid. In point of fact, the money had not been paid by the acceptor or by the drawer, but had been paid by a person who had simply purchased the bill; and the question was, whether the receipt on the back of the bill was conclusive that the money had been paid so as to discharge the bill. Lord *Tenterden* says: "We all think, upon full consideration, that the action is maintainable. It is not necessary for us to say what the effect of these indorsed memoranda of receipts would be, supposing that it were incompetent for the Plaintiff to contradict or explain them by parol evidence; because it seems to us that the Plaintiff may by law give such contradiction or explanation, and that in this case the parol evidence does satisfactorily explain the last memoranda made on each security, and shews distinctly that the balance was not paid by either *Almon* or the Defendants. A receipt is an admission only; and the general rule is, that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition. A receipt may therefore be contradicted or explained." Then in *Bowes* v. *Foster* (3) the marginal note is this: "The Plaintiff being in difficulties, and fearing that some of his creditors would issue execution against his goods, agreed with the Defendant, who was also a creditor, that there should be a pretended sale of them

(1) 3 B. & C. 421. (2) 3 B. & Ad. 313. (3) 2 H. & N. 779.

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to him. For this purpose an invoice was made out, and a receipt given to the Defendant for a sum therein stated to be the purchase-money, and possession of the goods was delivered to the Defendant. Afterwards the Defendant sold the goods as his own, whereupon the Plaintiff brought trover:—*Held*, that no property in the goods passed to the Defendant, and that the Plaintiff was not precluded from shewing that no payment was in fact made, and that the transaction was not a real, but a pretended, sale." In the course of that case Mr. Baron *Martin* says (1): "In *Alner* v. *George* (2), Lord *Ellenborough* said that a receipt in full was an estoppel; and if that be so, there would be an estoppel here. But I apprehend that case is not law. The distinction between a receipt and a release has been long established. The fact of a release must be pleaded and put on the record. A receipt cannot be pleaded in answer to the action; it is only evidence on a plea of payment; and where a Defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made; for how can a jury find that payment was made when it is proved that none was ever made?" And if it is not conclusive as to the money having been paid, neither is it conclusive as to the cause in respect of which it is stated in the receipt that it was paid.

Now there have been many cases raising this point at law, almost exactly in the same form as in the present case, though, as far as I can find, they have not gone before the Courts in banco. When I was on the Northern Circuit I was myself engaged in several of those actions. It was at one time a common practice with some railway companies to have a medical man who was their agent and servant, and whenever an accident took place he used to go and give advice and assistance to the persons injured, carrying receipts in his pocket, and he would induce them to sign receipts in full of all demands upon being paid some trifling sums. I can say from my own experience, that in every case of that kind tried on the Northern Circuit, the jury found a verdict against the company. The question was, Did the man, *bonâ fide* and fairly, knowing what he was about, receive the sum in satisfaction of his claims? And the answer to this question was found by

(1) 2 H. & N. 787. (2) 1 Camp. 392.

considering the whole of the circumstances under which the money was received. I have found two reported Nisi Prius cases on this subject. In *Roberts* v. *Eastern Counties Railway Company* (1), an action was brought against the *Eastern Counties Railway Company*, and there was a plea that the Plaintiff had received £2 in accord and satisfaction. It appeared that the Plaintiff was a ship-broker, and he was coming up to town in one of the carriages of the Defendants. When at *Bromley* station, owing to an error in the turning of the points, the train was overturned and the hat of the Plaintiff crushed. He was not aware at the time that he had been seriously injured, and when he arrived in London, the station-master suggested that he should have some remuneration for his spoiled hat, and gave him £2, for which he signed a receipt. The Chief Justice said: "It surely cannot be seriously argued that if the Plaintiff has been seriously injured he is precluded from recovering, because he agreed to accept £2 for his hat." The other case is *Rideal* v. *Great Western Railway Company* (2). That was an action for injuries sustained through a collision on the Defendants' line, which, it was admitted, arose through the carelessness of their servants. There were pleas of Not Guilty, and that the Plaintiff had received £20 in full satisfaction and discharge of the grievance complained of. Chief Justice *Erle*, in addressing the jury, said: "The question for you will be whether the Plaintiff's mind went with the terms of the receipt. The plea is, that the Plaintiff accepted the money in satisfaction for the grievances complained of, that is, the injuries now proved to have been sustained. In terms, the receipt which he signed no doubt supports that plea. Did his mind go with those terms? Was he aware of their import and effect at the time he signed? If, as he declares, he did not read the receipt, and supposed it was a mere receipt, it is clear that he did not so agree. But, on the other hand, if he did read it, being a man of business, he must be taken to have understood it, and it expressly included future and consequential injuries. No doubt a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still, if in fact a man has done so, he is bound by his

(1) 1 F. & F. 460. (2) 1 F. & F. 706.

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bargain. No improper practice has been proved, nor does it appear that the company's servants took any unfair advantage of the Plaintiff. The question, therefore, simply is, Did his mind go with the terms of the paper which he signed, and was he aware of its effect?" That, I apprehend, if this case is tried at law, will be the precise question the Judge ought to leave to the jury. Did his mind go with this receipt, and did he understand and know at the time that he was accepting it in full satisfaction and discharge? If his evidence is believed, that he said to *Blackmore* before he signed it: "Will this prevent my recovering future damages if the doctors' opinion turns out to be wrong?" and *Blackmore* told him: "No, it will not," and he, on the faith of that representation, signed the paper, then it is perfectly plain that his mind did not go with the receipt, and that the plea would not be proved.

That being so, what ground can there be for coming into equity to have the plea set aside. The bill is simply a bill to set aside the plea because it is not true, and cannot be proved. That is surely a question of fact which the jury ought to try. No doubt, if a case of fraud had been alleged in the bill and had been made out in the evidence, I should have felt myself bound, by the decision in *Stewart* v. *Great Western Railway Company* (1), to hold that this Court would be bound to give relief; though even in a case of fraud, the fraud in these cases being of a kind cognisable at law as well as in equity, when I consider how the case is tried at law, viz., by the evidence of witnesses who are produced before the Court and jury, and how it is tried here, viz., by affidavits, and that the cross-examining a witness who has first given his evidence on affidavit, as to which you cannot tell whether it is his own evidence, or evidence which some one else has put into his mouth, does not remedy the defect of the evidence being so given, instead of being given *vivâ voce* in Court in answer to the questions of counsel, who is not allowed to lead the witness—considering all this, I think it a misfortune that a fraud of this kind should not be tried at law along with the rest of the case, particularly when it is admitted that this Court cannot decide the whole question, but that there must be a trial at law. In this particular case I agree with the Lord Justice, that fraud is not alleged in this bill,

(1) 2 D. J. & S. 319.

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nor is it proved. The only equity set up by the bill, and attempted to be proved, seems to be this, that the Plaintiff signed this receipt subject to a stipulation that in a certain event he should not be bound by its terms, and that event having happened, he thinks he wants the assistance of a Court of Equity to prevent his being so bound. In my judgment, he does not want the assistance of a Court of Equity, because, if the case he sets up be proved, he will not be held to be bound by it at law. I think, therefore, the decree of the Vice-Chancellor must be reversed, and an order made to the effect that, the Court being of opinion that the whole case can be better tried at law, the bill should be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Ley & Brocklesby.*
Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland.*

HAWKSWORTH *v.* HAWKSWORTH.

L. JJ.
1871
April 25.

Ward of Court—Religious Education—Religion of Father.

A Roman Catholic died leaving a widow who was a Protestant, and an infant daughter, then six months old. He left no directions as to his child's religious education. The child was brought up by her mother as a Protestant till she was eight years and a half old. A suit having been instituted for the administration of the father's estate, the Court made an order that the child should be brought up in the Roman Catholic faith. The Court did not think it advisable to have an interview with the child.

Stourton v. *Stourton* (1) commented on.

Order of the Vice-Chancellor of the Duchy of *Lancaster* affirmed.

THIS was an appeal from an order of Mr. *Wickens*, the Vice-Chancellor of the Duchy of *Lancaster*, directing that *Catherine Hawksworth*, the infant child of Mr. *Thomas Hawksworth*, late of *Liverpool*, should be trained up in the Roman Catholic faith.

The infant was born in September, 1862. Her father died in March, 1863, leaving his widow, who was his third wife, surviving him. Mr. *Hawksworth* was a Roman Catholic, and the child was baptized in her infancy in the Roman Catholic Church. Mrs.

(1) 8 D. M. & G. 760.

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Hawksworth, his widow, was a Protestant, a member of the Church of *England*, and after her husband's death she had brought up the child as a Protestant. Mr. *Hawksworth* had also three children by his second wife, all of whom had been brought up Roman Catholics. Mr. *Hawksworth* died intestate, and left no directions as to the faith in which his infant child should be brought up.

The order appealed from was made in a suit instituted by the half-brother and sister of the infant for the administration of Mr. *Hawksworth's* estate, to which the widow was made defendant. The Vice-Chancellor, before making the order, had an interview with the child (1). Mrs. *Hawksworth* appealed from the order.

(1) 1871. Feb. 6.

MR. WICKENS, V.C., after shortly stating the circumstances, said:—

"I must, I conceive, hold that the child is to be brought up in the father's faith—that is as a Roman Catholic—unless there are special circumstances to exclude the general rule. At the same time, the sex and age of the child, the scantiness of her fortune, which produces less than £20 a year and the affection which appears to exist between the child and the mother render it impossible for them to be separated. Were I at liberty to follow my own opinion, I should have no hesitation in acceding to Mr. *Jackson's* argument. For to direct that this ward shall be brought up in the Roman Catholic faith will be to create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly, to inflict severe pain on both mother and child. But it is clear that no argument which would recognise any right in the widowed mother to bring up her child in a religion different from the father's can be allowed to weigh with me at all. According to the law of this Court the mother has no such right. The duty of the widowed mother is in general to bring up the child according to the faith which the father professed, even though she utterly disapproves of it. There are, no doubt, cases like *Stourton* v. *Stourton* (8 D. M. & G. 760) in which the Court has found special reasons for departing from the rule. On the authority of that case I saw the ward, and, by consent, I saw the mother also. It is clear to my mind that the child has been carefully and well educated; that both the child and the mother have the strongest feeling against any change in her religious education. But an interview of a few minutes between a girl under nine years old and a stranger could hardly lead to my coming to any conclusion like that which the Lords Justices arrived at in *Stourton* v. *Stourton*. That decision may have been, and probably was, right with reference to the case of a very unusual child; but I cannot help fearing that it has done some harm. I fear it may have led widowed mothers, in breach of their duty, and to the great injury of their children, to introduce them prematurely into an atmosphere of theological controversy, than which

(1) 3 Jur. N.S. 527

Mr. *Dickinson*, Q.C., and Mr. *Jackson*, for the Appellant:—

The child has now attained to an age when she is capable of receiving religious impressions, and has, doubtless, received such impressions from the teaching of her mother. In such a case permanent injury might be done by a change of religious education to the child's character, as well as great distress caused both to mother and child. She is only a few months younger than the infant in *Stourton* v. *Stourton* (1), in which case the Lords Justices refused to interfere with the course of religious instruction. Other cases favourable to us are *Witty* v. *Marshall* (2), *Austin* v. *Austin* (3), *Hill* v. *Hill* (4), and *In re Meade* (5). *Davis* v. *Davis* (6) is distinguishable. If the Court is not satisfied without seeing the child, we ask that this course may be pursued, as in *Stourton* v. *Stourton*.

Mr. *Yate Lee*, for the infant.

Mr. *North*, for the Plaintiffs, was not called on.

Sir W. M. James, L.J.:—

I am of opinion in this case that the Vice-Chancellor of the County Palatine, whose judgment has been read to us, has arrived at the right conclusion, and was also right in the manner in which, according to his own statement in the judgment, he dealt with the

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nothing can be more injurious to the mind and heart of a child, and this, it will be observed, for the purpose of convincing them that their dead father had wrong views. In the present case I knew that although I might be bound to give the ward an opportunity of speaking to me privately, the interview must necessarily, under the circumstances, be a form, and it was a form. I did not obtain, and, in fact, I did not in any way try to elicit, any opinion from her as to the questions between the churches. If I had thought that the child had been brought up to a keen and premature consciousness of the true bearing and meaning of those questions I should have formed a much less favourable opinion of the mother than I actually formed. As it is, however much I may regret the conclusion, the law must prevail, and the child must be brought up in her father's faith.

(1) 8 D. M. & G. 760.
(2) 1 Y. & C. Ch. 68.
(3) 34 Beav. 257; 34 L. J. (Ch.) 499.
(4) 31 L. J. (Ch.) 505.
(5) 19 W. R. 313.
(6) 10 Ibid. 245.

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infant in the interview he had with her. We do not think it right on our part to pursue that investigation into the state of mind of the infant which the Vice-Chancellor pursued as far as he thought it was right or proper to do so. The infant is a child of eight and a half years of age. She was the daughter of a Roman Catholic father, who, shortly before his death, had the child baptized in his own church, with, of course, Roman Catholic sponsors. He had other children, all of whom have been brought up as Roman Catholics. There is not the slightest trace of any indifference on the part of the father to the religious education of his child. There is nothing to shew that he would have acquiesced in the child being brought up a Protestant if he had been living. The rule of the Court is, that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been. In this case the child has been brought up by a Protestant mother, and has received such religious impressions as a child fairly intelligent, not, I suppose, a precocious child—for of that there is no suggestion—is capable of, such impressions as a Christian mother would produce in the mind of a carefully-educated Christian child. The Vice-Chancellor was of opinion that there was nothing to lead him to suppose that she had been unnaturally inducted into those matters of controversy between the Roman Catholic Church and the English Church, which it would be very difficult to suppose a child of eight years of age could have any reasonable appreciation of. Therefore, the child having been brought up as a well-educated religious child, and having arrived at the age of eight years and a half, when it is important that her future religious belief should be attended to, the question arises whether any other religion can be adopted as the religion of the child than that which was the religion of the father. I am of opinion that no other religion can be adopted. There have been cases in which the impressions produced on a child's mind have been considered to be so great and so permanent as to induce the Court to fear lest any attempt at altering them would do more

harm than good—would end in unsettling the child's religious faith altogether, and so produce a fatal result in that respect; but there never has been any inquiry as to the impressions, or feelings, or wishes of a child so young as this; and I certainly am myself not disposed to think that it is desirable to go beyond the case of *Stourton* v. *Stourton* (1). It appeared in that case, upon the examination of that poor child, who was nine years and a half old, that his intellect had been precociously excited, and he had been prematurely instructed by a proselytising mother in those matters of religious difference between the two churches which it was certainly most dangerous and most improper to endeavour to introduce into the mind of a child of those tender years; and I for one should be loth to do anything which could operate as the slightest encouragement to persons, whether mothers or not, who obtain access to young children, to begin the task of proselytising when they are of too tender an age to be disturbed by those religious controversies by which the adult world is so much distracted. I therefore decline myself to endeavour, by probing this child's mind, to ascertain whether the mother has done what there is no suggestion that she has done, namely, whether she has violated her duty to the child by endeavouring to impress upon her the peculiar differences between the two religions. The child is now eight years and a half old. She has, doubtless, learnt from her mother her duties as a Christian child, and the ordinary habits and practice of devotion; and there can be no danger to a child so instructed that those religious impressions and practices can be disturbed by having added to them the peculiar doctrines and practices of her deceased father, in whose faith she ought to have been brought up, and ought now to be brought up.

It appears to me that in affirming the decision of the Vice-Chancellor we are warranted, almost to the letter, by what was done in *Austin* v. *Austin* (2). The Master of the Rolls there allowed a Roman Catholic child to remain in the care of the Protestant mother uncontrolled. The Lord Chancellor *Westbury* affirmed that decision, and allowed the Roman Catholic child to remain in the care of the Protestant mother uncontrolled, but with a declaration that at a fitting age she should be instructed in the

(1) 8 D. M. & G. 760. (2) 34 Beav. 257; 34 L. J. (Ch.) 499.

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doctrines of the Roman Catholic Church. What that fitting age is he has pointed out himself clearly in the judgment, by declaring that when the child had arrived at seven years of age, then a further application should be made to the Court touching her guardianship and religious education. This mother has had the child in the same way that the mother in *Austin* v. *Austin* (1) would have had, up to the age of seven years, without any interference on the part of the Court with her religious instruction. When the time came for the religious instruction of the child in *Austin* v. *Austin*, it is quite clear, whether the application was made when the child was seven or eight years of age, this Court would be bound to carry into effect that declaration of Lord *Westbury*, that the infant should be brought up and educated as a member of the Roman Catholic Church. So in this case I am of opinion that the child must now be brought up as a member of the Roman Catholic Church, and that the Vice-Chancellor's order must be affirmed.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I agree in the conclusion to which the Vice-Chancellor came, and I entirely agree in the mode in which he conducted the case, and in his judgment, which has been read to us. I also agree in thinking that the case of *Stourton* v. *Stourton* (2) carried the principle of examining into the feelings and the religious opinions of a child quite as far as the Court can safely go. There is, at any rate, this distinction between that case and the present; that here the child is nearly a year younger. It certainly, to me, is very desirable that the rule of law which regulates the religion in which children of early years should be educated should be clearly laid down and enforced: and that rule unquestionably is, that unless the interest of the child interferes so as to make it the duty of the Court to make some exception, the child is to be educated in the religion of its father. Then is there really any reason why that rule should be departed from in this case? I can quite conceive that there may be a difference of opinion as to whether the rule of law is really such as it is desirable to have in the case

(1) 34 Beav. 257; 34 L. J. (Ch.) 499.

(2) 8 D. M. & G. 760.

where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might think that it would be for the interest of the child in such cases that the mother should be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case, and that rule of course we cannot alter. If, therefore, we were to reverse the decision in this case, we must reverse it on the ground that the child herself would be prejudiced from her having formed strong religious opinions which ought not to be disturbed. Now if we are to regard the opinions of a child at that tender age, it appears to me it must be wholly immaterial how the child has acquired them: for instance, if a child had been stolen from its parents for the sake of proselytism, and had been brought up in a particular form of religion, I presume that, after a certain age, even in such a case, the Court would not compel the child to be educated in a different religion. It is not necessary, nor would it be right, to lay down what the age would be; but it appears to me that it must be a very extraordinary case indeed where the opinions of a child of eight years and a half can be so formed that it would be really a serious prejudice to the child, on that ground alone, to have it brought up in a different faith; and I fear that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in that religion instead of the religion of the father. The Vice-Chancellor, who saw and examined this child, to see the general state of her education, came to the conclusion that it would be futile to continue that investigation by inquiring whether she had received a strong impression upon the matters in difference between the churches; and in that conclusion I concur.

Solicitors: Messrs. *Chester & Urquhart*, for *Townsend, Liverpool;* Messrs. *Yates & Martin, Liverpool.*

L. JJ.
1871
April 29.

Ex parte HAYWARD.
In re HAYWARD.

Bankruptcy—Petitioning Creditor's Debt—Bill of Exchange—Bankruptcy Act, 1869—*Practice—Time for Appeal—General Rules in Bankruptcy*, 1870; *Rule* 143.

The rule that the debt on which an adjudication of bankruptcy is founded must be a debt which existed at the time of the act of bankruptcy, is not altered by the *Bankruptcy Act*, 1869.

An acceptance was written on an incomplete bill of exchange, to which no drawer's name was affixed. The acceptor soon afterwards assigned all his property for the benefit of his creditors. Some weeks after this the bill, which had remained in the hands of the acceptor's agent, was completed and indorsed to a *bonâ fide* holder for value, who, on its being dishonoured, obtained an adjudication in bankruptcy against the acceptor, grounded on the assignment as an act of bankruptcy:—

Held, on appeal, that the adjudication must be reversed, as no debt existed on the bill till it was issued, which was after the act of bankruptcy.

An adjudication having been made against three partners, two of them appealed. The cases of all three were identical. The third, who had not appealed within the time fixed by the General Rules in Bankruptcy, 1870, was allowed to appeal, and the adjudication was annulled against all three.

THESE were separate appeals by *Hayward* and *Batten*, two out of the three members of the firm of *Hayward, Jones, & Co.*, and by *Jones*, the other partner, from an order of adjudication.

The petition for adjudication was presented by *Lamb* and *Spencer*, the holders of a bill of exchange for £177 7*s*. 6*d*., drawn by *Newton*, as manager of the *Peninsular and African Trading Company*, upon *Hayward, Jones, & Co.*, dated the 17th of March, 1870, payable three months after date, and accepted by them.

It appeared from the evidence that *Batten*, the junior member of the firm, being desirous of raising money, consulted with *Reid*, a financial agent, and *Newton*, the manager of the *Peninsular Company*, and in March, 1870, accepted, in the name of his firm, a blank form of bill of exchange, and delivered it to *Reid* that he might negotiate it. It was dated the 17th of March, 1870, but the name of the drawer was left in blank. As between *Batten* and his partners, the proceeding was unauthorized.

On the 4th of April, 1870, *Hayward, Jones, & Co.* made an assignment of all their property in trust for their creditors. At this time the bill was in the hands of *Reid* or of *Newton*, with the name of the drawer still in blank. In the latter part of April it was arranged that the name of *Newton*, as manager of the *Peninsular Company*, should be inserted as drawer, which was done, and on the 24th of May the bill was indorsed by *Newton* to *Lamb* and *Spencer*, whom the Court held to be *bonâ fide* holders for value. The bill was presented for payment on the 28th of June, and was dishonoured. *Lamb* and *Spencer*, finding that the deed of assignment had been executed, applied to come in under it, but the trustees of the deed refused in any way to recognise the claim. Ultimately, on the 4th of October, 1870, *Lamb* and *Spencer* presented a petition for adjudication, grounded on the assignment for creditors as an act of bankruptcy, and on the 22nd of December, 1870, after argument, Mr. Registrar *Murray* made an order accordingly.

Hayward and *Batten* entered an appeal within the twenty-one days prescribed by the General Rules in Bankruptcy, 1870, Rule 143, but *Jones* did not. The appeal came on before the Lords Justices on the 4th of March, when Mr. Serjeant *Sargood*, for *Jones*, asked to be heard on the appeal, or else to have liberty given him to appeal, notwithstanding the expiration of the twenty-one days. Their Lordships gave him leave to appeal on making the usual deposit, saving to the Respondents the liberty of taking the objection at the hearing that the appeal was out of time.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the first appeal:—

The petitioning creditor's debt must be subsisting at the time of the act of bankruptcy: *Moss* v. *Smith* (1); *Ex parte Holding* (2). There is no debt on a bill of exchange till it is issued for value: *Downes* v. *Richardson* (3). Here the bill not only was not issued till after the act of bankruptcy, but was not even a bill at all till after that time. The petitioning creditors have acquiesced in the deed by seeking to come in under it, and cannot treat it as an act of bankruptcy: *Ex parte Stray* (4). *Batten* had no authority to

(1) 1 Camp. 489.
(2) 1 Gly. & J. 97.
(3) 5 B. & A. 674.
(4) Law Rep. 2 Ch. 374.

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accept the bill, and the petitioning creditors took it with knowledge of suspicious circumstances, and are not *bonâ fide* holders.

[The LORDS JUSTICES stated that they did not require to hear the Respondents on the questions of *bona fides* and acquiescence.]

Mr. *T. E. Winslow*, and Mr. *A. L. Smith, contrà*:—

A bill of exchange creates a debt from its date: *Eden* on Bankruptcy Law (1); *Macartney* v. *Barrow* (2). It is true that it was incomplete at the time of the act of bankruptcy, but when completed it relates back: *Snaith* v. *Mingay* (3). We submit also that the learned Registrar was right in considering that the present statute does not require the debt to be existing at the time of the act of bankruptcy: 7 Geo. 1, c. 31; 5 Geo. 2, c. 30, s. 22: *Glaister* v. *Hewer* (4).

[They referred to *Keene* v. *Keene* (5) and *Kennerley* v. *Nash* (6).]

SIR W. M. JAMES, L.J.:—

This case does not appear to us one of any substantial difficulty, though the learned Registrar has come to a conclusion different from ours. The facts are these: Three gentlemen carrying on business in partnership make an assignment for the benefit of their creditors. One of these gentlemen has at the time in the hands of an agent of his—not an agent of the three—a piece of paper in the form of a bill of exchange, stamped and dated, but without any drawer; upon which piece of paper he has most improperly written what purports to be an acceptance on behalf of his firm. This paper remains in the hands of the agent till some weeks after the execution of the deed. It is afterwards completed by having the name of the drawer added to it, and comes into the hands of the petitioning creditors as *bonâ fide* holders for value. Until it was delivered to them, it never existed in a form in which it could have been used against the firm or against anybody else. Was there, then, a petitioning creditors' debt at the time of the act of bankruptcy? I am of opinion that there was not. The date of the bill proves nothing. It is necessary to prove the issue of the

(1) 3rd Ed. p. 47.
(2) 7 East, 437, n.
(3) 1 M. & S. 87.
(4) 7 T. R. 498.
(5) 3 C. B. (N.S.) 144.
(6) 1 Stark. 452.

instrument before the act of bankruptcy. The instrument itself, as Lord *Tenterden* says in *Cowie* v. *Harris* (1), does not shew the period of the indorsement or acceptance. Here that which ultimately ripened into an acceptance was written before the execution of the deed, but it was not an acceptance till the bill was put into the hands of the petitioning creditors; so there was no debt upon it at the date of the deed. Now, it is an old-established rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy, subject to the special provision about debts *in futuro*. It has been suggested that this rule has been altered by the Act of 1869, but I see nothing in the Act to that effect, and it would require very clear words to alter such a well-established and well-founded rule.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled, not on the ground of any express words in any of the Bankruptcy Acts, but because it would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or pays all his creditors in full, should be liable to be made bankrupt on account of that act by some person to whom he afterwards becomes indebted. In the present case the act of bankruptcy is an assignment for the benefit of creditors. At the time of that act the bill did not exist as a bill. It was urged, however, that when it was completed that completion related back to the time when the acceptance was written on it. No authority was adduced in support of this. In *Snaith* v. *Mingay* (2), indeed, the Court, for the advancement of manifest justice, held a bill to be an Irish and not an English bill, by a sort of relation. That is no authority for introducing relation here, so as to work a manifest injustice by enabling a subsequent creditor to come in and set aside a deed by which a debtor assigned all his property for the benefit of the persons who were his creditors at the time.

(1) 1 Moo. & M. 141. (2) 1 M. & S. 87.

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In re HAYWARD.

Mr. *Bagley*, for the appeal of *Jones*, referred to *In re Kelson* (1).

Mr. *Winslow*, for the Respondents:—

This appeal is out of time: *Bankruptcy Act*, 1869, ss. 72, 78; Gen. Rules in Bankruptcy, 1870, Rule 143. The case of *Ex parte M'Kenna* (2), where a cross appeal was allowed after time, was under a different statute, which was not so stringent.

SIR W. M. JAMES, L.J.:—

I am of opinion that we are fully justified in dealing with *Jones'* appeal. Two of the three bankrupts appealed from the order of adjudication, and in terms asked that it might be reversed only as against them. *Jones* then comes to the Court and says: "Do not reverse the adjudication as to two only. My interest is vitally affected by this appeal. I ought to be heard." I think that he was right, and that he was entitled to say: "Do not, on grounds common to all three of us, reverse the adjudication as to two only; reverse it altogether, or not at all." I think that a co-bankrupt, in circumstances like those of the present case, has such an interest in the continuance or non-continuance of the bankruptcy of the others, that their cases cannot be dealt with in his absence. We gave Mr. *Jones* leave to come here on the terms of making the usual deposit, and presenting an appeal, for we could not tell that there might not be a separate case against him; he was therefore put upon the terms of appealing, that the Court might have full jurisdiction as to costs, otherwise we should have allowed him to be heard at once on the other appeal. His case being the same as that of the other Appellants, I am of opinion that the adjudication must be annulled altogether.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Harper, Broad, & Battcock;* Messrs. *Plews & Irvine.*

(1) Law Rep. 4 Ch. 125. (2) 3 D. F. & J. 645.

CROOK *v.* CORPORATION OF SEAFORD.

L. C.
1871
May 31;
June 1.

Corporation—Agreement not under Seal—Acquiescence—Specific Performance—Boundaries of Sea-beach.

A municipal corporation passed a resolution in January, 1860, agreeing to let to the Plaintiff the flat part of the beach opposite to the Plaintiff's field, for 300 years, at a nominal rent. The Plaintiff claimed all the beach comprised between lines drawn in prolongation of the sides of his field, and he built a wall and terrace along the part so claimed. In 1864 the corporation gave the Plaintiff notice to quit, and, after much negotiation, in 1869 brought an action of ejectment against the Plaintiff, who thereupon filed the bill in this suit for specific performance:—

Held (affirming the decision of *Stuart*, V.C.), that though the agreement was not under seal, the corporation was bound by acquiescence, and must perform the agreement to grant a lease:

Held (contrary to the decision of *Stuart*, V.C.), that the boundaries of the piece of land agreed to be demised were lines drawn from the extremities of the Plaintiff's field perpendicular to the coast-line.

THE corporation of *Seaford*, on the 5th of January, 1860, passed a resolution to let to *Crook*, the Plaintiff in this case, a piece of land described as "the frontage of *West Gun Field*, with the flat part of the beach opposite (to be stumped-out at the expense of Mr. *Crook*.)" *Crook* was to build a terrace in front of his field for a public walk, and the lease was to be for 300 years at 10*s*. annual rent. A committee was to arrange the stumping with Mr. *Crook*.

The *West Gun Field* was of a nearly triangular shape, the base fronting the sea, and the sides bounded by roads to the beach.

There was some conflict of evidence as to what took place, but it seemed that the committee met *Crook* and proceeded to stump-out the land to be demised, but did not complete the stumping, as *Crook* claimed all the land which would be included between lines drawn in prolongation of the sides of his field, to which the committee objected. *Crook* thereupon himself stumped-out the land according to his view, and in 1861 built a sea-wall 700 feet long, and a terrace along the land as claimed by him. The corporation appeared to have made no objection to this until July, 1864, when they gave him notice to quit. He then asked for a lease, which

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the corporation refused, on the ground that he had not adhered to his agreement; but it did not appear what objection they took. Much correspondence passed, and at one time an arbitration was proposed by *Crook*, but the terms could not be agreed upon.

In October, 1869, the corporation commenced an action of ejectment, whereupon the Plaintiff filed the bill in this suit praying for specific performance and for an injunction to restrain the ejectment.

The Vice-Chancellor *Stuart* made a decree for specific performance, as reported (1).

The Defendants appealed.

Mr. *Greene*, Q.C., and Mr. *Waller*, for the Appellants:—

We contend that no specific performance of this agreement can be decreed: first, because the agreement is not under seal; secondly, because the land, through the fault of the Plaintiff, was never stumped-out and defined; and, thirdly, because this is an improvident lease, which such a corporation could not grant. As to the seal, it is clear that a corporation can only bind itself by deed under seal: *East London Waterworks Company* v. *Bailey* (2). It is contended that the corporation acquiesced, but that is not so: from the very first there were disputes, and the Defendant went on knowing that he was in the wrong, and that the corporation objected. At all events the decree cannot stand, as there cannot be a decree for specific performance of an agreement with a reference in effect to ascertain what the agreement is.

Mr. *Dickinson*, Q.C., and Mr. *Pontifex*, for the Plaintiff:—

Such an agreement may be valid though not under seal: *Marshall* v. *Corporation of Queenborough* (3); *Wilson* v. *West Hartlepool Railway Company* (4): and part performance makes all the difference: *Gregory* v. *Mighell* (5). As the corporation never stumped-out the land, and let the Plaintiff go on, they cannot at this length of time be heard to say that it was not properly stumped-out. At all events the Plaintiff has a right to a lease of something. There is no

(1) Law Rep. 10 Eq. 678.
(2) 4 Bing. 283.
(3) 1 S. & S. 520.
(4) 2 D. J. & S. 475.
(5) 18 Ves. 328.

evidence that the lease is improvident, and, on the contrary, the terrace is an advantage to the town.

Mr. *Waller*, in reply.

LORD HATHERLEY, L.C.:—

I have felt some difficulty about this decree, which directs a reference to Chambers as to the agreement, for it is the duty of the Court, in such a case as this, to ascertain whether there is an agreement, and if there is not, then to dismiss the bill. But I think that I have arrived at the proper construction of this agreement, and that the difficulty ought not to arise.

The corporation agreed to let the flat part of the beach opposite to the Plaintiff's field—a piece of waste which lay between the Plaintiff's land and the slope of the beach proper. The controversy between the Plaintiff and the Defendants has been as to the boundaries of the piece of land, the Defendants contending that it is to be bounded by lines drawn from the extremities of the Plaintiff's field perpendicular to the sea-coast, and the Plaintiff contending that the boundary lines are to be drawn in continuation of the boundaries of his field, which sloped back until they met at an angle. But this, if the angle were very obtuse, would give the Plaintiff an unreasonable amount of frontage; in fact, would give him the land in front of his neighbours. It is true that he was not to build upon it, but no one would like to have his access to the sea cut off by his neighbour's land. I think, therefore, that the true construction of the agreement was, that the land to be demised was bounded by lines drawn from the extremities of the Plaintiff's field perpendicular to the coast-line.

This construction renders the stumping-out of comparatively little importance, though no doubt it was proper to have the actual boundaries so defined when a lease for 300 years was to be made; and if this bill had been filed in 1860, claiming what the Plaintiff has now claimed, it would have been dismissed unless he chose to adopt the construction of the Defendants. But the Plaintiff was allowed to go on, and spend a large sum of money upon the wall and terrace, and to remain in possession of what he had improperly taken, whilst the corporation received the rent of 10s.;

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though no doubt there was some dissatisfaction expressed as to the proceedings of the Plaintiff. The wall built by him, moreover, did no harm unless it interfered with his neighbours; and, as far as the corporation were concerned, the greater length of wall he built the better it was for the town.

Then, in 1864, the corporation seem to have taken a different view of the matter:—[His Lordship then commented on the negotiations and on the offers of arbitration which had been made.] However, bringing an action of ejectment was not a proper course to take in such a case; the wall built beyond his boundary was of no advantage to the Plaintiff, and the matter might easily have been arranged; at all events, a Court of Equity could not allow the ejectment to proceed after the Plaintiff had spent so much money on the wall, although he did raise a contention, as to which he was in the wrong.

Upon this bill being filed the corporation raised several objections, one of which was that the agreement was not under seal. But a corporation, although it may not have eyes to see what is going on, has agents who can see, and if the corporation allow a wall to be built and money to be expended on the faith of a resolution regularly entered in their books, they must be answerable.

As to the power of this corporation to grant such a lease, they are not within the *Municipal Corporations Act,* and they get a wall and terrace built upon land which was of no use to them, and they thereby encourage people to build houses. It cannot be said to be an improvident lease.

[His Lordship then mentioned an objection as to the consent of certain feoffees, and decided that it was not a valid objection.]

As to the costs, the decree will be varied with respect to the boundaries, and that will save the costs of the appeal; but I do not think the Vice-Chancellor wrong in directing the Defendants to pay the costs of the suit:—[His Lordship then commented on the conduct of the parties as to the arbitration and the ejectment.]

MINUTES:—Vary the decree by declaring that, according to the true construction of the agreement, the corporation agreed to demise to the Plaintiff such portion of their property as formed the frontage of the Plaintiff's field and also the flat part of the beach comprised between two lines drawn from the extremities of such field

perpendicularly towards the sea, such lines being continued until they reach high-water mark. The Defendants to execute a lease accordingly. The Plaintiff undertaking to give up such parts of the land taken by him as are not comprised in the lease. No costs of the appeal.

Solicitor for the Plaintiff: Mr. *G. Brown.*

Solicitors for the Defendants: Messrs. *Palmer, Palmer, & Bull,* agents for Messrs. *Gell & Woolley, Lewes.*

WHITE *v.* SIMMONS.

Bankruptcy Act, 1869—*Equitable Mortgagee—Jurisdiction.*

Where a trustee has been appointed under a liquidation of the affairs of an equitable mortgagor, the mortgagee may, instead of applying in bankruptcy, proceed in Chancery against the trustee for the purpose of having the security realised, the jurisdiction in Chancery not being taken away by the *Bankruptcy Act*, 1869.

Order of *Stuart*, V.C., reversed.

THE bill in this case was filed by *T. White* against *H. Simmons, T. W. Cooke, H. Simonds,* and *H. Parsons,* and stated as follows: That *Simonds,* on the 17th of February, 1869, demised a farm in *Berkshire* to one *Noble* for twenty-one years; that *Simonds* had accepted all rent, and had no power to determine the lease, which was still subsisting; that *Noble* deposited the lease of the farm with the Plaintiff, by way of security for £736; that *Noble,* in 1870, presented a petition for liquidation, and *Simmons* was the trustee appointed under the liquidation; that *Cooke* acted as the solicitor of *Noble* and of *Simmons;* that *Cooke* was well aware of the deposit of the lease; that, notwithstanding such knowledge, *Simmons* and *Cooke* treated the Plaintiff's debt as unsecured, and omitted to take any notice thereof in the liquidation; that *Simmons,* acting under the advice of *Cooke,* and knowing that he was dealing with part of the Plaintiff's security, agreed to sell to *Parsons* the acts of husbandry and goodwill of the farm for £150, and also sold by auction the growing crops on the farm; that the Plaintiff, believing himself to be secured, did not prove his debt in the liquidation; that on the 25th of October, 1870, the Plaintiff was

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informed that *Simmons* and *Cooke* had induced *Simonds* to believe that the lease had been determined, and to grant what purported to be a lease of the farm to *Parsons* for twenty-one years from Michaelmas, 1870; that the Plaintiff was advised that his case was not one for the Court of Bankruptcy. And the bill prayed a declaration that the Plaintiff became entitled to an equitable lien or mortgage upon the farm, including the goodwill, acts of husbandry, and growing crops, in priority to any claim by *Parsons;* and the bill prayed that *Parsons* might be decreed to pay what was due to the Plaintiff, and, in default of payment, that the lease of the 17th of February, 1869, and the benefit of the acts of husbandry, might be sold and the proceeds paid to the Plaintiff; and that *Simmons* might be decreed to pay to the Plaintiff the moneys received for the growing crops, and that the Defendants might be ordered to pay the costs of the suit.

To this bill *Cooke* and *Simmons* demurred separately for want of equity, and because it appeared from the bill that this Court was not the proper Court or tribunal in which the Plaintiff ought to proceed against the Defendant in respect of the matters in question in this suit or any of them.

The Vice-Chancellor *Stuart* allowed both demurrers, being of opinion that the Plaintiff ought to have applied to the Court of Bankruptcy.

The Plaintiff appealed.

Mr. *Karslake*, Q.C., and Mr. *Haughton*, for the Appellant:—

There is nothing to prevent the Plaintiff from proceeding in equity to enforce his security; and all such rights are expressly reserved by sect. 12 of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71). Where jurisdiction has not been expressly taken away, the Court retains it: *Ex parte Isaac* (1). There are many questions raised on this bill which cannot be decided in bankruptcy, and the landlord and new tenant are not within the jurisdiction of bankruptcy. They have not demurred, and it would be very inconvenient to allow these demurrers, and leave the suit imperfect against the other Defendants. The trustee may be ordered to pay costs which the Plaintiff could not get by an ordinary application in bankruptcy.

(1) *Ante*, p. 58.

The LORD CHANCELLOR expressed his opinion that there was no case made by the bill against *Cooke*, and the appeal in that case must be dismissed.

Mr. *Dickinson*, Q.C., and Mr. *T. A. Roberts*, for *Simmons*:—

The Plaintiff ought to have taken the regular course, and to have made in bankruptcy the usual application of an equitable mortgagee to have his security realized. It has been held in *Stone* v. *Thomas* (1) and *Martin* v. *Powning* (2) that the jurisdiction in these cases is in the Court of Bankruptcy. So also in *In re Anderson* (3). The 72nd section of the *Bankruptcy Act*, 1869, gives complete jurisdiction to the Court of Bankruptcy. Besides, the bill is demurrable on the ground of uncertainty. It is impossible for the Defendant to know what case he has to answer. The bill may be a mere equitable mortgagee's bill, but throughout the bill some fraud is suggested, though not expressly charged.

Mr. *Karslake*, in reply.

LORD HATHERLEY, L.C., observed that, as far as he could see, the trustees had a right to sell the crops; and, according to the bill, the lease of 1869 was a subsisting lease. His Lordship then continued:—

I am afraid that I must allow this appeal, but it is with some reluctance. The demurrer against *Cooke* being allowed, the bill as against the Defendant *Simmons* is a simple bill by an equitable mortgagee to enforce his security. It is unfortunate for the Plaintiff that he should have come here, for though the demurrers have been argued and the appeal has been decided in less than six months from the time when the bill was filed, still, if instead of applying to this Court, the Plaintiff had presented his Petition to the Court of Bankruptcy, he would long before this time have had his security realized and have obtained everything he wants.

But the Plaintiff, as a mortgagee, stands outside the bankruptcy. He may come in under the bankruptcy if he chooses, and it would be wise of him to do so, especially as he asks for a sale only; but an equitable mortgagee might want other relief, as, for

(1) Law Rep. 5 Ch. 219. (2) Law Rep. 4 Ch. 356.
(3) Law Rep. 5 Ch. 473.

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instance, foreclosure, which he could not have obtained in bankruptcy, and he must retain his right to come here for such relief as he may want. The other Defendants have not demurred, but it seems to me that they might have done so; and I cannot allow any force to the argument that, as they have not demurred, the suit ought to be allowed to go on against this Defendant also.

But, on the general question, I think that I should strain the decisions which have been made if I held that, where there has in the *Bankruptcy Act* been an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security.

I must allow this appeal, and overrule the demurrer, but without costs.

Solicitors: Messrs. *Hillearys & Tunstall;* Mr. *F. L. Soames.*

L. C. 1871 *Jan.* 13, 16, 17; *Feb.* 10.

IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* COLEMAN.

Company—Trustees—Profit by Director.

By the articles of association of a financial company, it was provided that a director should vacate his office if he participated in the profits of any work done for the company without declaring his interest at a meeting of the directors. A director having undertaken to obtain money for certain railway debentures at 5 per cent. commission, offered them to the company at 1½ per cent. commission. The offer came before a committee of directors, of which he was not a member, and they recommended the board to accept the offer. The recommendation came before a board meeting of the directors, at which the director making the offer was present. He stated that he was interested in the matter, and proposed to retire, but was told by the chairman that it was unnecessary, and the offer was accepted by the board. The director appeared to have previously given full information to the two managers of the company as to his interest in the debentures:—

Held, that, according to the articles of association, it was contemplated that a director might have an interest in business brought by him to the company; and that, under the circumstances, this director could retain the difference between 1½ per cent. and 5 per cent. commission.

Decree of *Malins*, V.C., reversed.

THE Defendants in this case were *E. J. Coleman* and *J. W. Knight*, carrying on business as brokers under the firm of *Knight, Coleman, & Co.*

The *London, Chatham, and Dover Railway Company* had applied for an Act to enable them to raise money by issuing shares and debentures, and Sir *S. M. Peto*, for his firm, *Peto & Co.*, agreed with the company to take some of the shares and debentures when the company obtained powers under the Act. Messrs. *Lowndes*, who were acting for persons largely interested in the railway company, had an interview on the subject with *Coleman*, whose firm were brokers for *Peto & Co.* The result was, that *Coleman*, on the 4th of January, 1864, wrote to Sir *S. M. Peto* as follows: "I have had a very long conference with Messrs. *Lowndes & Co.* relative to the *Greenwich and Woolwich* capital, and if the following arrangement meets with your approval, we should like to proceed at once with the affair. I can arrange to place the whole of the shares and debentures for a commission of 5 per cent. in cash and 5 per cent. in A shares, to be paid as and when the deposits are paid into the company's bankers. I am, of course, not anticipating a war or any stringent money market, and I think it would probably take us about two months to place the shares. This is the best arrangement I could make with them, so I thought it better you should know at once, in case you thought you might do better with one of the new financial companies." In answer to this letter, Sir *S. M. Peto* wrote to *Coleman*: "I am in receipt of your letter of the 4th inst., and I have conferred with my partner, Mr. *Betts*, on the subject of its contents; and I have now to express to you our assent to the terms contained in your note for the issue of the *Greenwich and Woolwich* capital; and I shall be glad by your early attention to the matter."

Coleman had been a director of a company called the *Imperial Financial Company*. This company, under agreements dated the 3rd of June, 1864, joined or was amalgamated with a company called the *Mercantile Credit Association* as from the 31st of May, 1864. The joint company was called the *Imperial Mercantile Credit Association*, and *Coleman* became one of a temporary board of directors, which was formed for the management until the registration of the amalgamated company, which was effected on the 24th of June. The temporary board appointed a committee of six, of which *Coleman* was not a member; and the following proposal was, on the 7th of June, 1864, submitted by *Knight, Coleman, &*

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Co. to the committee: "The *Imperial Mercantile Credit Association* to undertake to place £356,300, 6 per cent. debentures, five years to run, *Metropolitan Extensions*, &c.; £585,000, 6 per cent. first preference shares, ditto; commission on debentures, 1½ per cent.; ditto on shares, 3 per cent.;" with other conditions. The committee passed a resolution to recommend this to the board for acceptance, with the modification of 5 per cent. instead of 3 per cent. commission on shares. The debentures and shares so to be placed were, in fact, part of those which the railway company expected to obtain power to issue, and to which the correspondence between Sir *S. M. Peto* and *Coleman* related.

On the 10th of June, 1864, this recommendation was laid before a meeting of the temporary board, at which *Coleman* was present.

It appeared that, when the proposal as to the debentures was brought before the meeting of the board, *Coleman* stated that he was interested in the sale of these debentures, and he offered to leave the room whilst the proposal was discussed, but was told by the chairman that it was unnecessary. The question then arose whether the association could enter into any such transaction, and Mr. *Morris*, the solicitor of the association, referred to the articles of association, which were then prepared, and were afterwards registered, the 83rd article being that "The office of a director shall be vacated if he contracts with the company, or is concerned in or participate in the profits of any contract with the company, or participate in the profits of any work done for the company, without declaring his interest at the meeting of the directors at which such contract is determined on or work ordered, if his interest then exists, or in any other case, at the first meeting of the directors after the acquisition of his interest; and no director so interested shall vote at any meeting or on any committee of the directors on any question relating to such contracts or work."

Mr. *Morris* advised the directors that if a director declared, at the time of any business being submitted to the board, that he was interested, the association could enter into the business. The board, thereupon, passed the following resolution, the placing of the shares having been given up: "The committee appointed at the last meeting presented their report upon Messrs. *Knight, Coleman, & Co.'s* proposition, which they have so far modified as

to recommend the £356,300 debenture stock of the *Metropolitan Extension* (*Greenwich and Woolwich*) be taken up at a commission of 1½ per cent. The proposal, as presented by the committee, was accepted."

In pursuance of this arrangement, the following sums were paid by the association: To *Knight, Coleman, & Co.*, in the course of June, 1864, £164,655 10*s.*; and then further sums, to or on account of the railway company, amounting altogether to £141,050, which, with £5344 10*s.* retained by the association for commission at 1½ per cent., £10,000 bonus, and £35,250 afterwards advanced, made up the sum of £356,300, for which debentures were issued by the railway company.

Out of the sum of £164,655 10*s.* so paid through *Knight, Coleman, & Co.*, they retained £12,470 10*s.* as their commission; this sum, with the £5344 10*s.* retained by the association, made up the sum of £17,815, or 5 per cent. on the £356,300 for which the debentures were issued. *Knight, Coleman, & Co.* had, by agreement with Sir *S. M. Peto*, commuted the commission, which by the agreement they were to receive on the shares, for a lump sum of £6230. No part of this sum was paid, and Sir *S. M. Peto* and his partners had become bankrupt.

The debentures became depreciated in value, and the association were great losers by them. The association was afterwards wound up, and the original bill in this suit was filed by the liquidators, in the name of the association, against *Coleman*, *Knight*, and a director named *Holroyd*, seeking to make them liable for the whole loss, and also to compel repayment of the said sums of £12,470 10*s.* and £6230.

The bill was afterwards amended by striking out the name of *Holroyd* as a Defendant, and making the bill merely a bill praying the repayment, by *Coleman* and *Knight*, of the sum of £12,470 10*s.*, and of so much of the £6230 as they might have received from Sir *S. M. Peto* or his estate.

There was some conflict of evidence as to what took place at the meeting of the temporary board of directors of the association on the 10th of June; and there was very considerable conflict of evidence as to whether Mr. *Coleman* had shewn the letters between him and Sir *S. M. Peto*, and explained the whole transaction to

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Mr. *Barker*, manager of the *Mercantile Credit Association*, and to Mr. *Sandeman*, manager of the *Imperial Financial Company;* or had led them to believe that he had no interest in the matter. The effect of the evidence is stated in the judgment of the Lord Chancellor.

The suit came to a hearing before the Vice-Chancellor *Malins*, who directed payment by *Coleman* and *Knight* to the official liquidator of the £12,470 10*s*., and interest at 5 per cent., and of whatever might be recovered by the Defendants from the estate of Sir *S. M. Peto* in respect of the £6230 (1).

The Defendants appealed.

(1) 1870. March 23. WM(1870)103.

SIR R. MALINS, V.C., after stating the facts of the case and the principal allegations in the bill and in the answer, continued:—

The Plaintiffs claim the restoration of the sum of £12,470 10*s*., with interest, on the ground that the Defendant *Coleman* was, at the time of the transaction, a director of the company, and was, therefore, not at liberty to make a profit out of any transaction with the company, but was bound as a director to obtain the debentures for the company at the lowest possible price, and that if he did obtain them at 95 per cent. he was bound to hand them over to the company at the same price.

The Defendants, however, contend that they were actually or virtually the owners of the debentures at the time, and were by the 83rd clause of the articles of association at liberty to contract with the company, although the Defendant *Coleman* was a director.

Were the Defendants then the owners of the debentures? [His Honour then read the statements on the subject contained in the bill, and read the two letters.]

I think it impossible to accede to the argument of the learned counsel for the Defendants, that this correspondence made the Defendants the owners of the debentures. There was no contract whatever with the *London, Chatham, and Dover Company*, to whom they belonged, to take them; and I cannot consider that Mr. *Coleman's* letter amounted to anything more than an engagement with Sir *Morton Peto* to use his best exertions to place the debentures for the commission named; and I am of opinion that an action even could not have been maintained against Mr. *Coleman* for a breach of that undertaking.

Much importance was also attached to the fact that this correspondence was shewn to Mr. *Barker* and Mr. *Sandeman*, the managers of the company, long before the contract was entered into; so early, I think it was said, as the month of January. The fact is positively denied by Mr. *Barker* and Mr. *Sandeman;* but whether it was or not is, in my opinion, wholly unimportant, as it is quite clear that they had no authority whatever to bind the company to waive any rights arising out of any irregular or unjustifiable conduct on the part of its directors.

It was also contended that the Defendants acted in this transaction merely as the brokers of *Peto & Co.;* but that circumstance would not, in my opinion, afford any justification to Mr. *Coleman* for charging the company, of which he

Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., and Mr. *James Kaye*, for Mr. *Coleman* :—

Knight and *Coleman* had entered into this contract with Sir

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was a director, a larger price for the debentures than he himself had paid for them.

Much reliance was placed by the Defendants' counsel on the 83rd clause of the articles of association, and it was urged that this clause was intended to supersede, and had the effect of superseding, the rules of this Court, which preclude a director from deriving profits from any transaction with the company of which he is a director. I am of opinion that it had not that effect, but was merely intended to prescribe what acts should vacate the office of a director; and even if it had the effect ascribed to it, I think it was incumbent upon Mr. *Coleman* not only to state at the meeting of the 10th of June, 1864, that he had an interest in the debentures, but also to state accurately what that interest was. He would, in fact, have been bound to state that he was offering them to the company at 98½ per cent., whilst he was procuring them at 95. But it has been conclusively shewn that he did not do so.

That the co-directors knew or suspected that he was getting some greater advantage by the transaction than the ordinary broker's commission, I think highly probable; but no such knowledge on their part could absolve him from his duty to the shareholders, as was expressly decided by Vice-Chancellor *Knight Bruce* in *Benson* v. *Heathorn* (1 Y. & C. Ch. 326), which I shall presently mention more particularly.

I do not, therefore, find anything in the transaction to relieve Mr. *Coleman* from the ordinary obligations of a director towards the company whose interests are committed to his charge. When he proposed that the company should take these debentures at 98½ per cent., he knew that he would procure them at 95. Was he justified in charging a larger price to the company, and putting the difference in his own pocket? I am of opinion that he was not.

It is of the highest importance that it should be distinctly understood that it is the duty of directors of companies to use their best exertions for the benefit of those whose interests are committed to their charge, and that they are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such duty.

It was admitted by the counsel for the Defendants to be important that these general principles of this Court should be maintained; but it was contended that they were not applicable to this case.

These principles were acted upon in the cases relied upon by the counsel for the Plaintiffs, namely, *Ex parte James* (8 Ves. 345), *Fawcett* v. *Whitehouse* (1 Russ. & My. 132), *Hichens* v. *Congreve* (1 Russ. & My. 150, n.), *Benson* v. *Heathorn* (1 Y. & C. Ch. 326), *Beck* v. *Kantorwicz* (3 K. & J. 230), *Aberdeen Railway Company* v. *Blaikie* (1 Macq. 461), and *Bank of London* v. *Tyrrell* (27 Beav. 273; 10 H. L. C. 26).

[His Honour then read passages from the judgments in those cases, and commented on them.]

Upon the principles of these authorities, and upon what I consider the soundest principles of justice, I think I am bound to treat the acquisition of these debentures by Mr. *Coleman* as a purchase of them on behalf of the com-

(18 C. 5 Jur. N.S. 914: 8 Jur. N.S. 849

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S. M. Peto before the association was even in existence, and they, therefore, could not have contemplated any dealings with the association.

We do not in the least dispute the authority of the cases cited by the Vice-Chancellor in his judgment, but they do not apply to this case. *Coleman* never voted, and took no part in the transaction. In the case of trustees one may retire, and then deal perfectly well with the others. The contract was properly, fairly, and honestly entered into: they all knew that *Coleman* would make a broker's profit, and this bill is an attempt to give the association something they never expected or were entitled to. The only ground for relief alleged by the Plaintiff is, in fact, fraud, and as they cannot establish it, they must fail altogether: *Hickson* v. *Lombard* (1). This company, like other similar companies, chose directors who could bring them business, and the company were willing, for the sake of getting that business, to waive the ordinary rules as to directors. The 83rd clause clearly shews this. If they did not allow their directors to make such profits, they would lose all this business. Would they have been pleased if they had heard that their directors were taking business elsewhere? They knew that *Coleman* would make a profit, and all they can say is, that they did not know it was so much; but that can make no difference if it is the fact. They got their profit, and had nothing more to do with it.

Mr. *Cotton*, Q.C., and Mr. *Ferrers*, for Mr. *Knight*:—

As to Mr. *Knight*, unless he was an active participator in the breach of trust, he cannot be made liable. There is no proof that he knew anything about the mode in which his partner made this profit: *Massey* v. *Davies* (2). The association had nothing to do with *Knight*, and have no remedy against him. This point was not

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pany of which he was a director, and to hold that it was, consequently, his duty to procure them at the lowest possible price, without any private advantage to himself.

In vitiation of the obligation which was thus imposed upon him, he conducted the purchase and acquisition in such a manner as to make a profit of £12,470 10*s.* to himself and his partner, and that sum, I am of opinion, he is bound to restore.

(1) Law Rep. 1 H. L. 324.

(2) 2 Ves. 317.

raised during the argument before the Vice-Chancellor, and was only mentioned after he had delivered his judgment. The only relief which could be given would be to annul the contract, but that cannot be done, as the parties cannot be replaced as they were. The company got the benefit of the issue of the debentures, and cannot now turn round and repudiate. It makes no difference that the transaction ultimately proved unprofitable.

Mr. *Cole*, Q.C., Mr. *Jackson*, and Mr. *Westlake*, for the Plaintiffs :—

These dealings were only discovered by the liquidation. If *Coleman* took part in the transaction, he cannot retain any of the profits he may have made; but there is no occasion to set the transaction aside: *Fawcett* v. *Whitehouse* (1); *Bank of London* v. *Tyrrell* (2); *Benson* v. *Heathorn* (3). Were the directors to make a profit out of the company, or were they to do their best for the company? As to any contract before the company was formed, we deny that the letters between *Coleman* and Sir *S. M. Peto* amounted to a contract. The terms are not sufficient; and, besides, a public body like this had no right to speculate on obtaining an Act and to deal with debentures before they had the power to issue them: *Ex parte Stanley* (4). The debentures were not issued to *Knight* and *Coleman* until they were sure of getting the money from the association, so that in fact the transaction was all after *Coleman* became a director of the association.

There is no proof that *Peto* had power to issue these debentures. The company paid large salaries to their directors, and they had no right to make more out of the company. *Coleman* was a paid officer of the company, and was bound to tell all he knew, and he ought to have told them that there was no binding contract as to these debentures: *Chaplin* v. *Young* (5).

As to the other directors exercising their discretion, the presence of Mr. *Coleman* must have had an influence; and, at all events, he ought to have retired, and he cannot complain of being held liable if he did not choose to act as he ought to have acted. There is no excuse for his not telling everything to the other directors. As to

(1) 1 Russ. & My. 132.
(2) 27 Beav. 273; 10 H. L. C. 26.
(3) 1 Y. & C. Ch. 326.
(4) 33 L. J. (Ch.) 535; 10 Jur. (N.S.) 713.
(5) 33 Beav. 414.

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any difference between *Knight* and *Coleman*, no such case was made by their answer, and they are both liable.

Mr. *Cotton*, in reply:—

Though the Act was not obtained, there was a valid contract as to the debentures whenever the Act was obtained.

Feb. 10. LORD HATHERLEY, L.C.:—

This is a case in which the official liquidator of the *Imperial Mercantile Credit Association*, in the name of the company, has filed a bill in order to have it declared that a certain sum of money received by the Defendants from the *London, Chatham, and Dover Company*, or from them through Sir *Morton Peto*, is a sum for which Mr. *Coleman*, who was a director of the company, is answerable to the company on the general principle that a person holding a fiduciary position with regard to a company cannot obtain for himself a benefit derived from the employment of the funds of the company in any matter in which he, the director, may happen to be engaged. The principle is so firmly established that I should be extremely sorry to say anything which would in the slightest decree impeach it; but the application of the principle is not always so easy in the various complicated arrangements which take place with regard to mercantile transactions, and especially with regard to the enormous transactions in which companies of this kind are in the habit of engaging. The Vice-Chancellor has thought it to be a case plainly and clearly within that principle. The whole history has, therefore, to be examined most carefully, to see what was the condition of the parties when the contract was entered into.

Now the state of the case is this:—[His Lordship then stated the facts of the case, observing that the engagement between Sir *S. M. Peto* and the company was not very distinctly set forth, and concluding that the word "them" at the end of *Coleman's* letter to Sir *S. M. Peto* referred to the shareholders and not to Messrs. *Lowndes*.] The Vice-Chancellor has expressed a doubt whether the agreement between Sir *S. M. Peto* and Mr. *Coleman* constituted

a final and binding agreement upon which an action would lie in case of any breach of it. I have not thought it necessary to enter minutely into that question. [His Lordship then commented upon the agreement.] How far the whole thing could be considered as completely and finally settled I do not pause further to inquire; but it was an arrangement entered into *bonâ fide* between the parties, by which Sir *Morton Peto* conceived himself to be undoubtedly bound, and upon which he, throughout the whole of the transaction, acted, and during the whole time he considered *Knight, Coleman, & Co.* as his agents, employed upon the terms which were specified in those letters. Now, this transaction had taken place prior to the birth, and prior, I may almost say, to the conception of the association, which association was formed by what is strangely called an amalgamation of two existing companies. Mr. *Knight* was not a director of either one or the other of those companies, but Mr. *Coleman* was a director of one of them. [His Lordship then stated the facts of the formation of the *Imperial Mercantile Credit Association,* and of the temporary board, and of the committee, and of the proposal from *Knight, Coleman, & Co.*, and of the resolutions.] I think one must look at all these transactions, although somewhat irregular as to form, considering the association did not exist at this date, as transactions between the present Plaintiffs and Messrs. *Knight* and *Coleman,* whatever the nature of that transaction may be.

The matter would be much more simple if the regulations of the association were in the ordinary form, if nothing whatever were said about directors interested or not interested, and if it were left to the ordinary operation of the rules of this Court, which lay down firmly that no director of a company can, in the absence of any stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a member. The reasons are given fully by the Vice-Chancellor *Knight Bruce* in *Benson* v. *Heathorn* (1), cited by the learned Vice-Chancellor in his judgment, and amount to this—that the company have a right to the services of their directors, whom they remunerate by considerable payments; they have a right to their entire services, they have a

(1) 1 Y. & C. Ch. 326.

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right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance.

However, the question then remains, whether the company cannot stipulate that this is a benefit of which they do not desire to avail themselves, and if they are competent so to stipulate, whether they may not think that in large financial matters of this description it is better to have directors who may advance the interests of the company by their connection, and by the part which they themselves take in large money dealings, than to have persons who would have no share in such transactions as those in which the company is concerned.

It is not for me to say which was the wiser or better course of the two, nor do I think that this Court professes to lay down rules for the guidance of men who are adult, and can manage and deal with their own interests. It would be a violent assumption if any thing of that kind were attempted. It must be left to such persons to form their own contracts and engagements, and this Court has only to sit here and construe them, and also to lay down certain general rules for the protection of persons who may not have been aware of what the consequences would be of intrusting their property to the management of others where nothing is expressed as to the implied arrangement. In this case it does appear to me that there was a distinct contemplation of directors being interested in the concerns of the company, and acting and voting when the matter came before the board of directors, and that the shareholders took such precautions as they thought necessary:— [His Lordship then read the 83rd clause.] Is it possible to read that clause and find any mode by which it could be maintained that the company meant to exclude a director from his office in case he should have an interest in a contract, or to exclude any contract being made in which any director should be interested? It seems to me to be perfectly impossible. The whole clause would be idle. They have taken the matter into their own hands, and

have said: "We do not mind a director who has an interest, but all that we provide is this—that he shall fairly state that interest at the time when the matter is under discussion. He shall not vote on the matter himself, and if he acquires an interest after the matter has been discussed, and after he has voted upon it, or whether he has voted upon it or not, if after the matter is discussed he acquires an interest which he does not disclose he shall be forthwith disqualified." That is the rule which they have laid down, and by that rule, as I apprehend, the conduct of Messrs. *Knight, Coleman, & Co.* must be tested in this case.

Now the Plaintiffs were quite aware of the necessity of making out a case of concealment, and they allege statements to have been made by *Coleman* with that intent.

[His Lordship then commented on the evidence of Mr. *Coleman*, Mr. *Sandeman*, Mr. *Barker*, and others, and came to the conclusion that Mr. *Coleman* had disclosed the whole to Mr. *Barker* and to Mr. *Sandeman*, the managers, though not to the directors; but that all the directors were perfectly well aware that the whole amount of Mr. *Coleman's* interest, whatever it might be, was to come out of what might be paid; and on that account Mr. *Coleman* himself, in making the proposal, proposed it at 1½ per cent., and not at a less rate; and that they were in the position which the 83rd clause requires them to be in, namely, that of knowing distinctly that Mr. *Coleman* had an interest, and an interest which any single director might have asked the extent of, and to him it would have been disclosed exactly as it had been to Mr. *Sandeman* and to Mr. *Barker*.]

Therefore Mr. *Coleman* was not in the position contemplated by Vice-Chancellor *Knight Bruce*, of being able to give advice; he was suspended from the office of director *pro hâc vice*. In fact, the company could not have the advantage from such large transactions of this kind being brought to them by brokers without submitting to the brokers taking an interest in the business which they brought, and the company chose to make that arrangement, if the director disclosed his interest. The fact of his appearing before them as a broker was known to every one of them, and shewed that he would get what they call the "usual broker's commission." Nobody tells us what that usual broker's commission is; it is something above

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1½ per cent. they all agree; but not a single person thought it worth his while to ask how this commission, which varies according to the circumstances, had been arranged between the parties.

It is upon that account that I have regarded this case with very great anxiety, because I would not be supposed for one moment to throw out a word that could tend to lead any trustee into the notion that he may deal with the persons for whom he is a trustee, or for whom he is a trustee with others, in any manner which will give him a benefit or put money into his own pocket. But that, like any other rule of the Court, is open to contract between the parties, for it is not a principle the benefit of which parties cannot waive by express and direct contract for the sake of other advantages which they suppose they derive. It is very analogous to the case of a solicitor which was put in argument by Sir *Roundell Palmer*. This Court has held strictly that no solicitor, or agent, or other person of that description, can derive any benefit or profit from the trust estate by being employed on account of the trust estate. If, therefore, a solicitor chooses to transact business, he can be allowed only costs out of pocket, for the parties have a right to the benefit of his advice; and otherwise he might be influenced as to entering into litigation which, if his mind was on the exact equipoise, he would probably have hesitated to enter upon. All these circumstances induce the Court to say that a solicitor in that position cannot be remunerated; but it does not prevent the parties from agreeing otherwise. A testator, whose will is drawn by the solicitor more often than not, and also parties to settlements, which are invariably drawn by solicitors—honourable men, no doubt, giving full information to their clients—continually introduce clauses enabling the solicitor who is made an executor or trustee to make his usual charges, the testator or settlor thinking, no doubt, that it would be a greater evil to be deprived of the services of the solicitor than to pay him his bills of costs.

The rules of the company seem to prescribe a mode of proceeding by which they exempted this particular case from the operation of the general rule of the Court of Equity, and it appears to me that Mr. *Coleman* sufficiently complied with that rule when he made it clear to all the persons (and they all admit that he made

it clear) that he had an interest as a broker which placed him in exact hostility to the others. I ought not to omit noticing an argument of Mr. *Cole's*, that Mr. *Coleman* being present, and not leaving the room, might be taken as voting in the matter as director; and that he ought to have quitted the room, otherwise his undue influence was employed in acting upon the minds of the directors. I think that that would be straining the expression, that "no director shall vote," to the highest degree, and would not touch the point and pith of the case; because the pith of the case really is, whether the directors who were assembled were aware of Mr. *Coleman* being in that position. If so, any speech or any statement he could make to induce them to make the arrangement they would know to be the speech or advice of a person directly interested in the matter; and therefore the directors were by the very terms of the contract put upon their guard, and told that they were to be careful in coming to a conclusion as to the transaction before them.

And I take it that even voting would not exclude an agreement under that rule. It might be the case that a director, having stated the whole of his interest, might state the reasons why it was in his view beneficial to the company to accept the contract. No vote, however, is recorded in this instance. The question was not put to the vote; for there was the general consent of all parties that this was a beneficial arrangement for the company.

I cannot say how much anxiety and labour it has cost me to examine minutely this case. I do not differ from the learned Vice-Chancellor in the slightest degree with regard to any of the principles of law which he laid down. I accept as guiding and enlightening the Court, and as having laid down the safe and sound rules of action in a case of this kind, every one of the authorities which the Vice-Chancellor referred to in his judgment; and the only conclusion which I come to, differing from him, is this, that in construing those articles I look upon this as a contract to which the rule of equity is not applicable in the particular case of this company; and I think—if it was fairly made known to the directors that their interests were antagonistic—that the circumstance that the commission was 5 per cent., instead of what is called the "usual brokers' commission," which nobody defines,

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is not a circumstance which leads me to say that there was not, upon *Coleman's* part, a full disclosure of his interest and share in the transaction. That being so, of course I can only dismiss the bill; and, having regard to the charges in it, I must dismiss it with costs; and the money which has been paid by Mr. *Coleman* must be repaid, with interest at 4 per cent.

Solicitors for the Plaintiffs: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Defendants: Messrs. *Maynard & Son.*

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ATTORNEY-GENERAL *v.* GREAT EASTERN RAILWAY COMPANY.

Public Body—Riparian Proprietors—Evidence.

12 Ch D. 399
16 Ch D 459

Where a public body is, under an Act of Parliament, entrusted with powers and duties for a public purpose, the Court will give credit to them as being the best judges of what they want for that purpose.

A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect.

Decree of the Master of the Rolls affirmed.

THE relators in this suit were the Conservators of the River *Cam*, a river the navigation whereof had been provided for by Acts the first of which was in the reign of Queen *Anne*, and the last was the *River Cam Navigation Act*, 1851 (14 & 15 Vict. c. xcii.). By this Act so much of the *Cam* as lies between *King's Mill*, in *Cambridge*, and *Clayhithe Ferry* was to be within the jurisdiction of the Conservators, and subject to the powers of the Act; and all the wharves, locks, and lands belonging to the former Conservators were vested in the Conservators under the Act. And by sect. 36 it was enacted, that it should be lawful for the Conservators, and they were thereby authorized and empowered, to maintain navigable the River *Cam* within those limits, and for that purpose to cleanse and open the said river, and cut or dig the banks thereof, and to make weirs, and locks for the passage of lighters and other vessels, and to cleanse, scour, open, or cut and dig the banks of

any other bank, stream, ditch, or watercourse falling into the said river, and to do many other things necessary or convenient for the said river and the passage aforesaid. And by sect. 38 it was enacted, that it should be lawful for the Conservators to survey the said river and all the ditches, sewers, and streams running into the said river, and all impediments and annoyances in the same, and to impose such fines and penalties, and to make such orders for removing the same, as any Commissioners of Sewers were enabled to do in other places. And by sect. 40, that the tops and uppermost part of the weirs should be lower by a foot than the surface of the adjoining lands. The expense of keeping up the sluices and works was to be defrayed out of certain funds in the hands of the Conservators, and out of tolls taken for the use of the navigation.

The average volume of water in the river would be altogether insufficient to make the river navigable if the water was not held up by weirs and other works which the Conservators were by their Act empowered to erect and alter. Within the limits of the Conservators' jurisdiction are two locks, the upper called *Jesus Green Sluice*, and the lower, about four and a quarter miles below, called *Baitsbite Sluice*. These locks, and all the works connected therewith, and portions of land on the banks of the River *Cam* for a certain distance on each side of the sluices, are vested in the Conservators.

About midway between the two sluices is a small stream, called the *Paper Mills Brook*, flowing into the *Cam* on the right bank. The whole ordinary flow of this brook did not, as the relators contended, exceed, and was often below, 150,000 gallons a day. The current was often imperceptible; and the relators contended, that if a large quantity of water was abstracted from the brook, the water must flow from the *Cam* into the brook. According to the Defendants, the usual flow was 300,000 gallons a day, and was at times 2,000,000 gallons.

The *Great Eastern Railway Company* have a large station near *Cambridge*, and had hitherto obtained the water which they required, partly from wells, and partly from a waterworks company, but they had recently put a pipe into the *Paper Mills Brook* capable of conveying to the station more than 150,000 gallons of water in twenty-four hours; and the company proposed to

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pump up water for the use of the station, and also of their own engines and of those of other companies using the station.

The information in this suit was filed to restrain the company from abstracting or diverting from the *Cam* any water for the supply of the station, or for other trade purposes of the company, or for any purpose whatever, so as to impede or injure the navigation of the *Cam*.

The company, by their answer, said that they did not intend to take more than 100,000 gallons a day, which would be for the most part supplied by the *Paper Mills Brook*, though to some extent it might be supplied from the river; and they maintained that a large portion of this would, by being wasted or sent down through sewers, be returned to the *Cam*. They also said that there was an ample supply of water for the navigation of the river.

As to the effect on the navigation of the river which would be caused by the abstraction of water, the lock-keepers and others deposed, on the part of the relators, that when there was less than three and a half inches of water falling over the weir into the tumbling bay at *Baitsbite Sluice*, the barges had to be assisted in reaching *Jesus Green Sluice* by water let down from that sluice; that at times barges had been stopped for want of water; that the lock-keepers had at times received orders not to draw the sluices for four days unless rain had come; and that they wanted all the water they could get. On the side of the Defendants evidence was produced that water was always running over the weir at *Baitsbite*, and that on an average day 20,000,000 gallons ran to waste over the weir, so that the amount proposed to be abstracted by the railway company would, at *Baitsbite Sluice*, reduce the depth by about one-fourteenth of an inch only, and would in other places be inappreciable. The further effect of the evidence is stated by the Lord Chancellor in his judgment.

The Master of the Rolls, on the hearing of the cause, made a decree, reciting his opinion that if the *Great Eastern Railway Company* took any water from the *Cam* for the purposes of their station, they would impede and injure the navigation of the river, and restraining the company from abstracting or diverting any water from the *Cam*, so as to impede or obstruct the navigation, or render the maintenance thereof more chargeable to the Con-

servators, or to impede the usual and natural flow of water to the *Cam*.

The Defendants appealed.

Mr. *Jessel*, Q.C., and Mr. *Smart*, in support of the appeal:—

There are three questions: first, whether the taking of the water is of any injury to the navigation, and we shew by our evidence that there is no appreciable injury; secondly, whether we have not, as riparian proprietors, a right to take water; and, thirdly, whether we are prohibited by the Acts relating to the river. A riparian proprietor has a right to all ordinary use of water, and even to extraordinary use if he does no damage: *Miner* v. *Gilmour* (1); *Lord Norbury* v. *Kitchin* (2); *Nuttall* v. *Bracewell* (3).

It has been said that though the quantity we propose to take will make no difference, yet if every riparian proprietor took a similar amount the water would be sensibly reduced; but that argument has not been held good: *Embrey* v. *Owen* (4). The Plaintiffs have no property in the water: *Medway Navigation Company* v. *Earl of Romney* (5). We say that we do no damage: if we do, let the Plaintiffs proceed at law. There is no question of right, and the Court will not interfere unless the injury we propose to do is real. At all events the injunction ought not to apply to all times. During floods, and, in fact, during most of the year, there is an abundance of water, and we ought not then to be interfered with. The order of the Master of the Rolls must be varied, as it leaves the question open whether we can take water or not.

Sir *R. Baggallay*, Q.C., and Mr. *Rigby*, for the Relators:—

These Defendants are a railway company constituted for a particular purpose, and it does not follow that they have the same rights as ordinary riparian proprietors have: *Bostock* v. *North Staffordshire Railway Company* (6). The Conservators are prohibited from raising the weirs, and must depend upon the flow of water, which must be carefully preserved. The Conservators are a public body, and it is their duty to preserve the river. This is

(1) 12 Moo. P. C. 131.
(2) 9 Jur. (N.S.) 132.
(3) Law Rep. 2 Ex. 1.
(4) 6 Ex. 353.
(5) 9 C.B. (N.S.) 575.
(6) 3 Sm. & Giff. 283.

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an interference with their rights, and special damage need not be shewn: *Bickett* v. *Morris* (1). An action at law would be ineffectual.

Mr. *Smart*, in reply.

LORD HATHERLEY, L.C.:—

This case does not present any difficulty whatever upon some of the larger questions which have been raised with regard to the riparian proprietors on this river. The natural stream of the *Cam* was apparently useless for any of the ordinary purposes of commerce. From the reign of Queen *Anne* down to the date of the last Act, 14 & 15 Vict. c. xcii., persons have been appointed to keep up the navigation of the river, and their powers are now vested in a certain body, who are called the Conservators of the *Cam*. They have ample control for that purpose over the river and the streams which feed it:—[His Lordship then read the 36th section of 14 & 15 Vict. c. xcii.]

In the particular part in question there seems to be a considerable stream, called the *Paper Mills Brook*, which brings down a quantity of water. The quantity is in dispute, but may fairly be taken not to exceed 300,000 gallons *per diem*, although somewhere near 2,000,000 of gallons may have come down on some particular day.

From this important feeder the Defendants were about, until they were restrained by the order of the Master of the Rolls, to withdraw a quantity of water, no less than one-third of the total amount supplied. Now this is not at all the case of an ordinary river, the persons bordering upon which may have, for their ordinary purposes, a right to use the water. We have here persons appointed by an Act of Parliament who, *primâ facie*, have the first right to be judges in the matter, being a public body entrusted with powers and duties for a public purpose. I apprehend that the Court gives, in the first instance, credit to them as being the best judges of what they want; and I apprehend that no engineer from another river has a right to inform them how much water they want; and any evidence shewing, or tending to shew, that they have quite enough, is, to my mind, of extremely little weight. We know how figures

(1) Law Rep. 1 H. L., Sc. 47. 12 Jur. N.S. 803.

may be manipulated for purposes of this kind, and I have no doubt that it may be shewn that the whole amount of the water drawn off in a day would not, if spread over four and a quarter miles, take off more than one-fourteenth of an inch of water; but how that average withdrawal of water over the whole may at particular moments and times—just when a barge wants to get through a lock—affect the particular spot from which the water is being drawn off, before it has had time to diffuse its operation over the whole extent of the reach, there is no possibility of knowing from a calculation of that kind.

It may be true that when these Defendants have done what they threaten to do the Conservators of the River *Cam* would have a much better river than a great many rivers; but this does not in the least assist us in arriving at any conclusion as to the legal rights of the parties. The Conservators are entitled to have the best river they can, and certainly, on the evidence, it is clear that it is not a particularly good one when they have done their best.

Now there is plenty of evidence to shew that the river is not at all more abundantly supplied with water than is wanted; in fact, at times, they want every available lockful they can obtain, and yet it is proposed to draw off at least two locksful *per diem*. The lock-keepers tell you they have special orders at some particular seasons not to let any lockful run off at all for so many days, and that they are in particular difficulties when there are not three and a half inches over the ledge of the tumbling-bay. Then they give you dates and observations which shew a great many days when there was not that quantity of water. They shew you what quantity of water is wanted to pass over the sill, and what quantity of water the barges draw; that the barges are not unfrequently obliged to wait because they cannot get enough water, and that they are thankful to have assistance rendered by the flushing operations done at the lock above.

It appears to me that the Master of the Rolls has not gone at all too far in making this injunction general, for no one can tell at what time these diffiulties may happen.

It is not necessary to enter into any question as to what these Defendants might have done if they had drawn off a small quantity—a thousand or two of gallons in the course of the day; but

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when it comes to be a question of 100,000 gallons, it appears to me that there has been a clear damage done, and the Conservators are the persons to be the judges of that damage. They have no personal interest at all in the matter; they have only their duty to discharge, and are to be so treated in any Court before whom the case may come, unless the other side can shew a manifest and palpable case of wilfulness in their desire to impede without doing any good to themselves.

I have not heard anything to induce me to suppose that the Conservators are actuated by any other object than that of doing their duty. It appears to me that the Master of the Rolls is right, though, perhaps, the decree might have been in a better shape. If I have to deal with it hereafter upon a motion for breach of the injunction, I shall hold that it must mean abstraction of water for the use of the station "as in the bill mentioned," that is, to a large amount. It is not a question of pailsful, but of locksful; and that forms the ground of the application.

I agree with the Master of the Rolls, and dismiss the appeal, with costs.

Solicitors for the Relators: Messrs. *J. & C. Cole.*
Solicitor for the Defendants: Mr. *W. H. Shaw.*

L. C. 1871 *July* 28.

PAYNE *v.* DICKER.

Demurrer—Bankrupt Plaintiff—Leave to Amend—Costs—Appeal.

A bankrupt cannot file a bill without previously applying to the Court of Bankruptcy on the subject.

Where a demurrer to a bill by a bankrupt was allowed, but without costs and with liberty to amend:—

Held, on appeal, that, under the circumstances, costs ought to have been given, and liberty to amend refused.

Order of *Stuart*, V.C., varied.

THE bill in this case was filed by *M. R. C. G. Payne* against *J. C. Dicker*, *W. Justice*, *H. M. Dalston*, *F. Yates*, *W. Strong*, and *C. J. Furber*, and stated that the Plaintiff was entitled to a certain reversionary interest. The bill then stated certain transactions between the Plaintiff, *Dicker*, *Justice*, *Yates*, and *Dalston*.

resulting in charges on the reversionary interest made by the Plaintiff to *Justice*, *Yates*, and *Dicker*, and alleged to be made under misrepresentation, and for larger sums than had been advanced; that in July, 1867, the Plaintiff was adjudicated bankrupt in his absence from *England*, and the Defendant *Strong* was, at the request and by the contrivance of the Defendants *Dicker* and *Furber*, appointed assignee. That a suit of *Justice* v. *Payne* had been instituted in which the Plaintiff's reversionary interest had been sold. That the Plaintiff had repeatedly requested the Defendant *Strong* to permit his name to be used by the Plaintiff for the purpose of filing a bill to set aside the decree in that suit, but that *Strong* had always refused. That the total amount due to the Defendants, *Dicker*, *Justice*, and *Yates*, at the time of the sale did not exceed £3200, leaving a large surplus due to the Plaintiff after satisfying all claims upon him. The bill contained numerous charges of conspiracy, and of acts amounting to fraud, the effect of which is stated in His Lordship's judgment, and the bill prayed a declaration that the securities held by the Defendants respectively might stand as a security for such moneys only as were actually advanced, and interest, and that the surplus in Court and the sum overpaid to *Dicker*, *Justice*, and *Yates* might be repaid to the Plaintiff, and for other relief.

To this bill the Defendants *Justice* and *Furber* demurred. The Vice-Chancellor *Stuart* allowed the demurrer, on the ground that the Plaintiff was a bankrupt; but gave no costs, and gave liberty to amend.

The Defendants appealed.

Mr. *Shapter*, Q.C., and Mr. *Graham Hastings*, for the Appellants:—

We say that liberty to amend ought not to have been given, and that we ought to have our costs. The Plaintiff is bankrupt, and cannot at any time file a bill; and this is not a defect which can be cured by amendment: *Attorney-General* v. *Corporation of Avon* (1); *Low* v. *Routledge* (2). It is not a case where the Plaintiff has omitted some necessary statement, but a case in which the right to sue is shewn to be in another. Moreover, we ought to have had

(1) 3 D. J. & S. 637. (2) 33 L. J. (Ch.) 717; 10 Jur. (N. S.) 922.

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our costs. If a man chooses to file a bill like this, he ought to pay the costs. In *Bothomley* v. *Squires* (1) costs were refused, but leave was there given to amend. Here no such leave ought to be given. Costs have been refused to a Defendant because he has answered when he might have demurred: *Webb* v. *England* (2); *Godfrey* v. *Tucker* (3); and a Defendant is in a very painful position if, though he succeeds, he is refused costs, whether he answers or demurs. If a Plaintiff has a good equitable title, imperfectly stated, that defect can be cured by amendment; but a defect like this could not have been cured by a supplemental bill, and cannot be now cured by amendment. Besides, a Defendant should not be harassed by so vague a bill (4).

Mr. *Karslake*, Q.C., and Mr. *Robson*, for the Plaintiff:—

The Court has a discretion as to costs, and the Vice-Chancellor has thought fit not to give them. Since the new practice a defect like this may be cured by amendment: *Tudway* v. *Jones* (5); and leave to amend is almost always given: *Wellesley* v. *Wellesley* (6). A vendor can maintain a bill for specific performance, though he may be able to make his title good only after bill filed. So an executor can file a bill before obtaining probate. It is entirely a matter of discretion with the Court: *Maughan* v. *Blake* (7). Why should the Plaintiff be put to the expense and trouble of filing a new bill? If the statements in the bill are true, there will be a large surplus for his creditors. A bankruptcy is not an absolute alienation; the property is taken away only to benefit the creditors, and that is what the Plaintiff is trying to do by this bill. If the official assignee refuses to proceed, what is the Plaintiff to do?

LORD HATHERLEY, L.C.:—

I think it is quite clear in this case that the demurrer ought to be allowed and these Defendants dismissed from the suit. The

3 Drew 577.

(1) 1 Jur. (N. S.) 694. But see 2 Jur. (N. S.) 153.
(2) 29 Beav. 44.
(3) 33 Beav. 280.
(4) The bill was not drawn or signed by the junior counsel who appeared on this appeal for the Plaintiff.
(5) 1 K. & J. 691.
(6) 4 My. & Cr. 554.
(7) Law Rep. 3 Ch. 32.

7 Jur. N.S. 153.
6 Jur. N.S. 1188.

mode in which the averments of this bill are framed is of such a character as certainly would not induce the Court to suppose that there is really any *bonâ fide* case made, or sought to be made, against these particular Defendants, Mr. *Justice* and Mr. *Furber*. It is not necessary in this case to determine the position of a bankrupt who chooses to file a bill in his own name without any permission on the part of the Court of Bankruptcy, he being under disability at the time, by reason of his bankruptcy, or to determine whether such a bill might be amended by reason of the inchoate interest or the remaining interest in him, if such should be found to exist. But I should say at once that this Plaintiff ought not to have filed such a bill without taking previous proceedings in the Court of Bankruptcy. He ought either to have had the bankruptcy superseded, or to have had a change of assignee, or to have obtained leave to file a bill in the name of the assignee. One of these things ought to have been done before the bill was filed, and there is no excuse alleged for his not having taken some such proceedings.

It would be a monstrous thing if persons were to be kept here on a bill framed in such a loose, fragmentary, and informal manner as this bill is, until the Plaintiff shall think proper to do that which he may never do at all:—[His Lordship then commented on the allegations in the bill, and the form of the bill, and expressed a doubt whether these Defendants might not have demurred even if the Plaintiff had been capable of suing, and said that the purpose of the Plaintiff appeared to have been to see how much he could annoy these two Defendants, and to harass them by this suit. His Lordship then continued:—]

I think that if a person takes no steps in a suit or a bankruptcy pending so long as in this case before he files his bill the demurrer to that bill must be allowed with costs. This does not appear to me to be an application for costs, but an application to be relieved from the annoyance of such a bill.

The order of the Vice-Chancellor must therefore be discharged, and the demurrer must be allowed with costs.

Solicitor for the Plaintiff: Mr. *R. Cottman.*
Solicitors for the Defendants: Messrs *Deane & Chubb.*

L. JJ.
1871
March 24;
April 21;
May 1.

In re LAND CREDIT COMPANY OF IRELAND.

McEWEN'S CASE.

Company—Winding-up—Past Members—Bankrupt Shareholders—Scotch Sequestration—Companies Act, 1862, *ss.* 38, 75, 77.

1871 71. 7 Ch. 324

The liability of a past member of a company in liquidation, who is placed on the B list of contributories, is capable of being proved as a debt under the bankruptcy of such contributory if the bankruptcy takes place after the commencement of the winding-up; and the bankrupt, on obtaining his discharge, is entitled to be removed from the list of contributories. The fact that the B list is not made out till after the adjudication of bankruptcy makes no difference.

The same doctrine is applicable to a Scotch sequestration as to an English bankruptcy.

Decision of the Master of the Rolls reversed.

THIS was an appeal from an order of the Master of the Rolls made in the winding up of the *Land Credit Company of Ireland, Limited.*

The company was registered in 1864, under the *Companies Act*, 1862.

On the 18th of May, 1864, Mr. *McEwen*, the Appellant, became the holder of fifty shares in the company. He subsequently transferred his shares to a purchaser, and the transfer was registered on the 29th of November, 1864.

On the 27th of June, 1865, a Petition was presented for the winding up of the company, under which a winding-up order was made on the 1st of July.

On the 20th of July, 1866, the certificate of debts was settled by the Chief Clerk, and the debts were certified as amounting to £1010 only.

On the 30th of July, 1866, a sequestration in bankruptcy was issued in *Scotland* against the Appellant, and a sequestrator appointed.

On the 10th of August, 1867, the Appellant obtained his discharge.

On the 8th of July, 1868, an order was made by the Master of the Rolls, which was affirmed by the Lords Justices on the 30th of April, 1869 (1), allowing a claim by *Overend, Gurney, & Co.* for a

(1) Law Rep. 4 Ch. 460.

large amount against the company. This decision rendered it necessary, in the opinion of the official liquidator, to make out a list of past shareholders who had transferred their shares within a year before the commencement of the winding-up, the calls payable by the existing shareholders not being sufficient to satisfy the liabilities of the company. Accordingly a list of the past shareholders, called the "B list," was brought in on the 30th of July, 1869, and was finally settled on the 7th of November, 1870.

The Appellant's name having been included in this list, he took out a summons to have it removed. The Master of the Rolls held that the case was governed by *Hastie's Case* (1), and that the liability of the Appellant was not such a debt as could have been proved under his bankruptcy in *Scotland*. He accordingly dismissed the summons, and from this order Mr. *McEwen* appealed.

Before the conclusion of the argument, the Lords Justices directed the case to stand over for the purpose of serving the sequestrator. This was done, but the sequestrator did not appear.

Mr. *Cotton*, Q.C., and Mr. *Dunning*, for the Appellant:—

We admit that the Scotch Bankruptcy Act contains no such wide clause as the 31st section of the *Bankruptcy Act*, 1869; and therefore, independently of the provisions of the *Companies Act*, 1862, such a liability as the present could not have been proved under the sequestration. But we contend that this right is given to the official liquidator by the 75th and 77th sections of that Act, and consequently that the bankrupt is discharged from that liability. The liability of a shareholder to any debt of the company accrues at the time when the debt is contracted by the company: *Williams* v. *Harding* (2); and although that liability cannot be estimated while the company is a going concern, it can be estimated immediately that the company is ordered to be wound up: *Parbury's Case* (3); *Ex parte Pickering* (4). The fact that the Appellant in the present case was on the B list, and not among the present shareholders on the A list, makes no difference; for although the

(1) Law Rep. 4 Ch. 274.
(2) Ibid. 1 H. L. 9.
(3) 3 D. F. & J. 80.
(4) Law Rep. 4 Ch. 58.

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B list was not made out till after the bankruptcy took place, the rights of the parties are to be taken as at the date of the winding-up; and the making out of the list is postponed merely for convenience and to save costs. No doubt it would be a difficult matter to make an estimate of the liabilities of past shareholders immediately on the winding-up; but the difficulty is almost as great in the case of shareholders on the A list, with respect to which the authorities are conclusive.

Mr. *Southgate*, Q.C., and Mr. *Jackson*, for the official liquidator:—

The authorities respecting the contributories on the A list do not apply to the B list. The liability of the past shareholders does not commence at the same time as that of the existing shareholders. It is entirely created by the 38th section of the *Companies Act*, 1862. By the 3rd clause of that section it is provided that no past member shall contribute "unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them." "Unless" here must mean "until," and so it has been construed by the Court, for it has been decided that the B list is not to be made out till the Court is satisfied that the contributions from existing members will be insufficient: *Andrews' Case* (1); *Needham's Case* (2); *Weston's Case* (3). The case of the past shareholders is similar to that of the shareholders in a going concern, where the liability is continually varying, and cannot be estimated: *Hastie's Case* (4). Each share would have to be dealt with separately; it may have been transferred several times within the year, or forfeited; and at the time of the commencement of the winding-up the contingencies to be calculated would be infinite: *Bridger's Case* (5); *Creyke's Case* (6); *Mudge* v. *Rowan* (7); *Warburg* v. *Tucker* (8).

[They also referred to *Mitchell's Case* (9) and *Martin's Patent Anchor Company* v. *Morton* (10).]

Mr. *Cotton*, in reply.

(1) Law Rep. 4 Eq. 458.
(2) Ibid. 135.
(3) Ibid. 6 Eq. 17.
(4) Ibid. 4 Ch. 274.
(5) Ibid. 4 Ch. 266.
(6) Law Rep. 5 Ch. 63.
(7) Ibid. 3 Ex. 85.
(8) 5 E. & B. 384.
(9) Law Rep. 5 Ch. 400.
(10) Ibid. 3 Q. B. 306.

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May 1. Sir G. Mellish, L.J., delivered the judgment of the Court, as follows:—

This was an appeal from the order of the Master of the Rolls, whereby he refused to remove the applicant, Mr. *McEwen*, from the list of contributories in Class B of the *Land Credit Company of Ireland*. The company was ordered to be wound up under a petition presented in June, 1865, and Mr. *McEwen* was a shareholder in the company, who had transferred his shares within a year from the commencement of the winding-up, and it was admitted that he was liable to be inserted as a contributory in Class B, unless he was freed from such liability by having been made a bankrupt under a Scotch sequestration in July, 1866, and having received his discharge in August, 1867. At the time when *McEwen* was so made bankrupt and discharged, it had not been ascertained that it would be necessary to resort to the contributories in Class B, and no proceedings were taken to make a list of contributories in Class B until the 30th of July, 1869, when the List B was left in Chambers.

Under these circumstances, the Master of the Rolls dismissed the summons, on the ground that the amount of the liability of *McEwen* could not be calculated at the date of the sequestration, and that therefore the liquidator could not have proved against the estate of *McEwen*. It was admitted that, under the provisions of the Scotch bankrupt law, no such proof could have been made, but it was argued that, according to the true construction of the 38th, 75th, and 77th sections of the *Companies Act*, 1862, whenever any shareholder, who is liable to be put on the list as a contributory, either in Class A or in Class B, becomes a bankrupt after the commencement of the winding-up, the liquidator is entitled to prove for the amount of his liability against his estate, and the assignees or trustees of the estate are to be inserted in the list of contributories in lieu of the bankrupt; and we are of opinion that this is the true construction of the Act.

It was held in *Ex parte Pickering* (1), and in other cases, that the liability of a contributory in Class A must, after the commencement of the winding-up, be treated as an existing debt capable of proof. The present Lord Chancellor, in *Ex parte Pickering* (2), says: "The

(1) Law Rep. 4 Ch. 58. (2) Law Rep. 4 Ch. 61.

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75th clause of the *Companies Act*, 1862, contains a clear provision that the liability of a contributory shall be deemed to create a debt accruing due from the time when his liability commenced, and that in case of his bankruptcy, proof may be made not only for calls already made, but for the estimated value of his liability to future calls. So here *Pickering's* debt must be considered to have accrued from the time of his becoming a shareholder. While the concern is a going concern, the amount of liability to future calls is incapable of being estimated, but when the company is being wound up the state of things is altered, and the contributory is a debtor for an amount which the Legislature assumes to be capable of being estimated." Now the 75th and 77th sections make no distinction between the liability of a contributory in Class A and the liability of a contributory in Class B, and we are of opinion that the Legislature has treated the liability of both classes of contributories as constituting debts the amount of which is, after the commencement of the winding-up, capable of being estimated. A winding-up order is the commencement of legal proceedings, in the course of which it necessarily becomes the duty of the Court to determine the liability of every alleged contributory of the company and the amount of such liability, and we think that the Legislature has acted upon the principle that *id certum est quod certum reddi potest*, and that no one ought to suffer or to have his position altered by delay in legal proceedings. It was, indeed, argued before us that the 3rd clause of the 38th section makes a material distinction between the liability of a contributory in Class B and that of one in Class A, and postpones the liability of contributories in Class B until it has been proved to the satisfaction of the Court that the contributories in Class A are unable to satisfy the claims against the company. This clause, however, leaves the period at which the Court will enter into the inquiry whether the existing members are able to satisfy the debts of the company entirely to the discretion of the Court, and the Court, usually for the sake of convenience and economy, postpones entering into the inquiry until the actual necessity of making out a list of contributories in Class B arises; but we think it would be unjust and contrary to legal principles if the right of the liquidator on behalf of the creditors to prove against the estate of a contributory who has

become bankrupt, and the right of the bankrupt to avail himself of his discharge, were to depend upon the time at which the Court may have thought it expedient to enter upon the inquiry whether the existing shareholders are able to satisfy the debt of the company. On the other hand, if it be said that the right of the liquidator to prove against a contributory in Class B will depend not upon the question whether the Court has entered upon the inquiry whether the contributories in Class A are able to satisfy the debts of the company, but upon the question whether such facts have happened as render it possible to ascertain the amount of the liability of the contributories in Class B, or of the particular contributory in Class B who has become bankrupt, at the time he has become bankrupt, there will be the greatest difficulty in determining in each particular case whether the bankrupt or the trustees of the bankrupt are the proper persons to be made contributories in each particular case. In the present case, the debts of the company were supposed, at the commencement of the winding-up, to be very inconsiderable, but a claim was made against the company by *Overend, Gurney, & Co., Limited,* for £230,000, and after a litigation which lasted several years, the claim was held to be valid. At what time did it become possible to ascertain the extent of the liability of a former shareholder liable to be placed in Class B? At the time when the claim was first made, or when it was decided by the Master of the Rolls that the claim was a valid claim, or when that decision was finally confirmed on appeal, or not until the B list was left at Chambers? Moreover, it is quite clear that the extent of the liability of the contributories in Class A depended upon the determination of the claim of *Overend, Gurney, & Co.* quite as much as the extent of the liability of the contributories in Class B, and yet if any of the contributories in Class A had become bankrupt at any time after the commencement of the winding-up, it seems clear on the authorities that the liquidator would have had to prove the amount of his liability on his estate, however difficult or even impossible it might have been to ascertain the amount of such liability at the time.

On the whole, we are of opinion that an order ought to be made on the summons, that the name of Mr. *McEwen* should be removed

L. JJ. 1871 McEwen's Case.

from the list of contributories, and that the name of his trustee, who, after notice of the summons, has not appeared, should be substituted. We think that Mr. *McEwen* should have his costs in the Court below, but that there should be no costs of this appeal. The official liquidator will have his costs out of the estate.

Solicitors: Mr. *Gover;* Mr. *Walter Upward.*

L. JJ. 1871 *May* 1.

CLARK *v.* HENRY.

Will—Absolute Gift at Twenty-five—Gift Over—Time of Vesting—Costs of Appeal.

A testator bequeathed all he should die possessed of to be equally divided between his two sisters, to be invested in their names as they should direct; one sister (who was then over twenty-five years of age) to have the immediate control of her share, and the other sister upon attaining twenty-five years, until which time it was to be held in trust for her. And in case of the death of either of his sisters before him, or before marrying and having children, the whole of the property to go to the survivor. The elder sister married and had children:—

Held, that the gift over to the surviving sister, on the contingency of the death of the other before marrying and having children, was referable to such death occurring before she should attain the age of twenty-five years; and that the younger sister, on attaining twenty-five, though still unmarried, became absolutely entitled to a moiety of the property.

Decision of *Malins*, V.C., affirmed.

An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs.

CAPTAIN *WILLIAM CLARK*, by his will, bequeathed all he should die possessed of to be equally divided between his sisters *Ann Clark* and *Sarah Clark*, and he directed that all his personal property should be invested in his sisters' names as they should direct, his sister *Ann* to have the immediate control of her share, and his sister *Sarah* upon attaining the age of twenty-five years, until which time his uncle would hold it in trust for her; and in case of the death of either of his sisters before the testator, or before marrying and having children of their own, the whole of the property he might die possessed of to go to the survivor.

The Vice-Chancellor *Malins* held, upon the construction of this will, that the younger sister took a moiety of the property on attaining the age of twenty-five years, and that her interest

was not contingent on her marrying and having children; as reported (1).

The other sister, who was married and had children, appealed.

Mr. *Bovill*, for the Appellant, besides the cases cited, and the arguments used before the Vice-Chancellor *Malins*, in support of the Appellant's claim, cited *Milner* v. *Milner* (2). He contended that the testator knew, as appeared from the will, that one sister had attained the age of twenty-five years, and that therefore there could be no contingency of her attaining that age, and the limitation over applied to both sisters. That shewed clearly that he did not intend the attaining the age of twenty-five to have any effect on the absolute interest.

Mr. *Glasse*, Q.C., and Mr. *Grenside*, for the other sister, were not called upon.

Mr. *Cotton*, Q.C., and Mr. *Ince*, for the executors.

SIR W. M. JAMES, L.J.:—

This is a will for the construction of which no other will can form a precedent, and which can never form a precedent for the construction of any other will.

We are asked to reverse the decision of the Vice-Chancellor, and to hold that the gifts over are upon the contingency of dying without being married and having children. But we have to construe the words of limitation with reference to the former words. It is probable that the word "or" in the gift over on the event of either sister marrying, is to be read "and," and that the testator meant that, if either died before him unmarried, then her share was to go over. He appears to have expected something to be done at his death, and that if they had then attained the age of twenty-five years they were to have the property. He did not contemplate a trust during the whole life of either; and on the whole will we agree with the decision of the Vice-Chancellor.

SIR G. MELLISH, L.J.:—

We must endeavour to put a reasonable construction on the whole of this will. That which has been contended for by the

(1) Law Rep. 11 Eq. 222. (2) 34 Beav. 276.

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Appellant gives no meaning at all to the plain direction, that at the age of twenty-five *Sarah* was to have control of her share. I agree with the Vice-Chancellor on the general construction which he has put upon the will. Whatever else the testator may have meant, he certainly meant that when either sister attained the age of twenty-five years she should have her share.

THEIR LORDSHIPS dismissed the appeal with costs, observing that if a claimant is not satisfied with the decree of one of the Courts below on the construction of a will, and chooses to appeal, he must take the consequences.

Solicitors: Messrs. *Durnford & Co.*; Mr. *J. B. Marsden*; Messrs. *Spyer & Son.*

L. JJ. 1871 *May* 5.

In re BAYLEY'S SETTLEMENT.

Deed—Construction—Younger Son—Vesting.

4 Ch. D 257. 268, 9, 270

A father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail:—

Held (affirming the judgment of the Master of the Rolls), that the rule of construction was the same as to realty and personalty, and that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates.

UPON the marriage of *J. Bayley* and *E. Franklin* two settlements were executed. By one, certain real estate of the husband was limited, after the death of *J. Bayley*, to the use of the first and other sons of *J. Bayley* and his wife successively in tail male. By the other settlement, certain real estate of the wife was conveyed to trustees for the life of the wife, with remainder to the use of "all and every the son and sons (other than and except an eldest or only son) and daughter or daughters of the body of the said *James Bayley*, the younger, on the body of the said *Elizabeth Franklin* to be begotten, in equal shares as tenants in common, if more than one, and to the heirs of their respective bodies issuing; and if any one or more such younger son or sons, daughter or daughters, shall depart this life, and there shall be failure of issue

of his, her, or their body or respective bodies, or in case any such younger son or sons shall become an eldest or only son before he or they shall attain the age of twenty-one years, then as well as to the original share or shares of such younger son or sons, daughter or daughters, who shall so die, and whose issue shall so fail, and of such younger son or sons so becoming an eldest or only son as aforesaid, as to the share or shares which shall survive or accrue to any such younger son or sons, daughter or daughters, or to their or any of their issue, by the decease or failure of any other the said younger son or sons, daughter or daughters, or by any other younger son or sons becoming an eldest or only son before he or they shall attain the age of twenty-one years, to the use of the survivors or survivor, or others or other of the said younger son or sons, daughter or daughters, to be divided between or among them if more than one as tenants in common, and to the heirs of their respective bodies issuing. And if all such younger son or sons, daughter or daughters, save one, shall die without issue, or in case any such younger sons or sons, save one, shall become an eldest or only son, or if there shall be but one such younger son or daughter, then as to the entirety of the said hereditaments and premises to the use of such remaining or such one or only younger son or such only daughter and the heirs of his or her body issuing; and in case there shall be no younger son or daughter of the said *James Bayley*, the younger, on the body of the said *E. Franklin* begotten, or being such they and every of them shall depart this life, and there shall be failure of issue of their respective bodies, then, and in default of such issue, to the use of the only or eldest son and child of the said *James Bayley*, the younger, by the said *E. Franklin*, and the heirs of his body issuing," with divers remainders over.

Three sons and two daughters attained the age of twenty-one years. *J. Bayley* died in 1842, whereupon the eldest son entered into possession of his estate, and died without having barred the entail; the next son had previously died without having barred the entail, and the third son, who had attained the age of twenty-one, then entered into possession, and died in 1859, leaving a son, and without having barred the entail. The mother died in 1867.

The question raised in this case was, whether the son of the

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third son was to share with the daughters in the wife's estate; and the Master of the Rolls decided that he was not to share, as reported (1).

The son appealed.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for the Appellant:—

The settlement merely says "eldest son," not "eldest son succeeding to the estate," which words, according to the decision of the Master of the Rolls, must be interpolated. It is not right to decide what the settlors must have intended, and then to interpolate words to that effect. This case is clearly governed by *Windham* v. *Graham* (2). The rules as to ascertaining a class do not apply here, for this is a settlement of real estate which must be held to vest as early as it can, and must not remain contingent during the life of the mother. The inconvenience of contingent estates are so great that the Court will always incline to hold them vested, and a reasonable construction must be adopted: *Heneage* v. *Hunloke* (3). The settlors cannot have intended to exclude every son who attained the age of twenty-one, and died in the lifetime of the parent. If the eldest son had cut off the entail and died, then the son who became eldest would take nothing under either settlement, which cannot have been intended. The observations of the Lord Justice *Turner* in *Remnant* v. *Hood* (4) bear strongly on this case. Moreover, the share of a younger son is expressly given over, but only if he becomes an eldest son before he attains the age of twenty-one years, which shews that he was not to be excluded if he became an eldest son after attaining that age.

Mr. *Jessel*, Q.C., and Mr. *Speed*, for the daughters, were not called upon.

Mr. *Ince*, for the trustees.

SIR W. M. JAMES, L.J., after reciting the clause in the settlement, continued:—

These words occur in a settlement of one estate which refers to a settlement of another estate, which gives estates to sons in suc-

(1) Law Rep. 9 Eq. 491.
(2) 1 Russ. 331.
(3) 2 Atk. 456.
(4) 2 D. F. & J. 396.

cession in tail male. The words used in this settlement have acquired a meaning fixed by authority, which gives effect to what must have been the intention of the settlor, that where one son takes the bulk of the estate he is not to share in the provision made for the others. And in these cases the words "eldest son" have been held to mean not "firstborn son," but the son who takes the family estate. That is clearly so with respect to portions; and it would be very inconvenient if we were to adopt the rule as to vesting suggested by the Appellants, and apply one rule to personalty and another to realty in such cases. That would be a far greater inconvenience than any which has been pointed out on the other side.

If "eldest son" has a defined meaning in these Courts, that meaning must be put upon the words when used by conveyancers; and the same construction ought to be applied by Courts of Law as well as by Courts of Equity with respect both to realty and personalty. The construction is settled by authority, and the question is, whether it is affected by the words in the gift over, and I do not think that it is legitimately altered by those words. The gift over has a natural and proper operation; the class must, in the first instance, be ascertained, and the class is ascertained at the time of distribution, that is to say, when the property is to be dealt with. It is said that we are overruling *Windham* v. *Graham* (1); but it is obvious that in that case the rule was admitted, though it was said that there were peculiar words in that case, the result of which was that, rightly or wrongly, the Court was induced to come to a decision that in that particular instance the character of younger child was to be ascertained when the portions vested and became payable. There are no such circumstances here; and the general rule, that younger children are children other than the child who has succeeded to the family estate, must prevail.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Does "eldest son" mean "firstborn son," or that son who will, under the provisions of the settlement, come into possession of the estate? The ordinary rule shews that it would be the son who came into possession of the estate; that was the con-

(1) 1 Russ. 331.

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struction put in the House of Lords on those words in *Collingwood* v. *Stanhope* (1), and I see no reason why the same words, which have acquired a technical and artificial meaning, should not have that meaning here, and then there is no difficulty in the construction of this settlement. [His Lordship then read the clause.] It appears to me that there is no difficulty in the construction; no doubt the Courts of Equity have given that construction to these words, and if the case came before a Court of Law the same construction would be given, and the words "eldest son" and "youngest son" would receive that technical meaning which they have acquired.

The appeal must be dismissed with costs.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Clarke, Woodcock, & Ryland.*

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Ex parte MILLS. *In re* MANNING.

Bankruptcy—Injunction—Bankruptcy Rules 1870, *Rules* 260, 289—*Bankruptcy of one of two Joint Debtors.*

8 Ch 561. — 685, 16 Eq. 616 8 Ch D. 121 6 P D 215

Two partners accepted a bill of exchange. After this they dissolved partnership; and shortly afterwards one of them filed a petition for liquidation by arrangement. A resolution for liquidation was passed by the creditors, and a trustee chosen. Immediately after this the holder of the bill commenced an action against both acceptors, and they pleaded a joint plea that they never accepted the bill. After notice of trial had been given the trustee applied for an injunction to restrain further proceedings against the liquidating debtor in the action, and the Registrar, sitting for the Chief Judge, granted an injunction accordingly:—

Held, on appeal, that rule 289 of the Bankruptcy Rules, 1870, did not make it imperative on the Court to grant an injunction, but left the Court a discretion:

Held, further, that though it would have been proper to restrain the Plaintiff from proceeding against the insolvent acceptor if the injunction had been applied for at once, the proper course, under the circumstances of the case, was to allow the action to proceed, and only to restrain the Plaintiff from enforcing his judgment against the property or person of the insolvent acceptor.

THIS was a motion by way of appeal from an order of Mr. Registrar *Spring Rice*, acting for the Chief Judge, which restrained the

(1) Law Rep. 4 H. L. 43.

Appellants from proceeding further against *Manning* in an action brought by them against *Manning & Benson*, and ordered the Appellants to pay the costs of the application.

On the 1st of June, 1870, the Appellant drew on *Manning & Benson*, who were carrying on business in partnership, a bill of exchange for £90, payable six months after date. This bill was accepted by the partners. On the 5th of July the partnership was dissolved, and the dissolution gazetted on the 9th. On the 22nd of November *Manning* filed a petition for liquidation by arrangement under the *Bankruptcy Act*, 1869, s. 125. On the 12th of December a meeting of creditors was held, and resolutions were passed that the debtor's affairs should be liquidated by arrangement and not in bankruptcy, and that he should be entitled to his order of discharge as soon as he had paid 11*s.* in the pound, and that *D. Roome* should be appointed trustee.

One of the Appellants, who were partners, proved at this meeting for the amount of the bill, and signed the resolutions in the name of his firm.

On the same day the Appellants applied to *Benson* for payment of the bill, and the answer not being satisfactory, they, on the 16th of December, commenced an action under the *Bills of Exchange Act* against *Manning & Benson*, who jointly put in a plea that they had never accepted the bill. The Appellants gave notice of trial, and were thereupon served with an interim order made on the 21st of January, 1871, by Mr. Registrar *Spring Rice*, restraining further proceedings against *Manning* in the action till the 28th of January, and with a notice of motion for a perpetual injunction. On the 24th of January the solicitor of the Appellants wrote to the solicitor of the trustee, stating that the joinder of *Manning* was merely formal, and that the action was not prosecuted with a view to execution against him. They further undertook not to proceed against *Manning* beyond using his name in order to make the proceedings regular, and offered to consent to an order to that effect without costs. The trustee, however, determined to proceed with his application for an injunction; and on the 28th of January the order now appealed from was made.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the Appellants, referred

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to Rule 260 of the Bankruptcy Rules, 1870, and *Ex parte Isaac* (1).

Mr. *Little*, Q.C., and Mr. *Reed*, *contrà*:—

Rule 260 must be read along with rule 289, which makes it imperative to grant an injunction. The joinder of *Manning* is unnecessary, for the *Bankruptcy Act*, 1869, s. 112, enables the Plaintiff to go on against the other partner alone. By sect. 125, clause 7, liquidation is equivalent to bankruptcy for the present purpose. Under the old law if a bankrupt were joined for conformity an indemnity had to be given him: *Ex parte Read* (2); *Ex parte Stanton* (3). The injunction gives effect to the intention of the Legislature as indicated in sect. 72, which is that no proceedings except in bankruptcy are to be taken against a debtor whose affairs are being wound up in bankruptcy.

[The LORD JUSTICE JAMES:—Suppose three trustees commit a breach of trust, and one goes into liquidation. The case requires to be tried in Chancery; is the *cestui que trust* to proceed in Chancery against the other two only?]

We submit that in such a case, as against the trustee in liquidation, the account must be taken in bankruptcy.

SIR W. M. JAMES, L.J.:—

I am of opinion that an application for an injunction is always an application to judicial discretion. I do not think that rule 289 is so wide as to exclude this discretion, and I think that rule 260 applies in every case. If the application had been made at once it would, in my judgment, have been right to grant an injunction *simpliciter*, for the Plaintiff could, under sect. 112 of the Act, have proceeded with his action against the other Defendant alone. But when the writ was served the two debtors joined in applying for leave to plead, and pleaded that they never accepted the bill; then after notice of trial this application for an injunction was made. It appears to me that this course was adopted for the purpose of delaying the proceedings against *Benson*. I think that,

(1) *Ante*, p. 58. (2) 1 V. & B. 346.
(3) 1 M. D. & D. 273.

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in the circumstances of this case, the order ought to have been to the effect of sect. 12 of the Act restraining the Plaintiff from taking any proceeding against the property or person of *Manning*, but not from proceeding with the action; and the Registrar's order will be altered accordingly.

SIR G. MELLISH, L.J.:—

What we have to do is, to make the order which the Registrar ought to have made, though, owing to the delay in the hearing of this appeal, the Respondent has gained his object. The purpose of the application evidently was to prevent the action being tried at the next assizes; and I cannot agree that it was imperative on the Registrar to grant this injunction. Had the application been made at once, there would have been no harm done by granting it; but it ought not to have been granted at this stage, when its only effect is to delay the remedy against *Benson*.

Solicitors: Mr. *E. Woodard*; Messrs. *Russell, Son, & Scott*.

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1871
March 9, 10,

Will—Construction—Absolute Interest—Family.

A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will gave a part of the testator's estate to an illegitimate son of one of the testator's sons:—

Held, that the gift was valid.

Decree of *Malins*, V.C., affirmed.

JOHN LAMBE by his will gave his freehold house in *Cockspur Street*, and all his estate, to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The testator died in 1851, leaving the widow and children. One of his sons had an illegitimate son, *Henry Lambe*, born in the lifetime of the testator, but after the date of his will.

The widow died in 1865, having by her will devised the freehold house in *Cockspur Street* to trustees upon trust for one of her

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daughters, *Elizabeth Eames*, but charged with an annuity for *Henry Lambe*.

Henry Lambe filed the bill in this suit to obtain payment of the annuity, which was disputed by *Elizabeth Eames* on the ground that the widow had only a power of disposition amongst the family, and that *Henry Lambe* being illegitimate could not take under that power.

The Vice-Chancellor *Malins* decided that the devise to the widow was absolute, and that she had therefore power to devise to the Plaintiff, as reported (1).

The Defendant *Elizabeth Eames* appealed.

Mr. *Bristowe*, Q.C., and Mr. *W. Barber*, for the Appellant:—

This case is covered by authority, which decides that such a gift constitutes a trust for the benefit of the children: *Woods* v. *Woods* (2); *Raikes* v. *Ward* (3); *Crockett* v. *Crockett* (4); *Salusbury* v. *Denton* (5); *Scott* v. *Key* (6); *Godfrey* v. *Godfrey* (7); *Lucas* v. *Goldsmid* (8). The widow was probably entitled to the income if she maintained the family, and was to have a large discretion as to the mode of investment and of dealing with the property, but that is all. If she had a power to appoint by will, it could only be amongst the family, and that will not include the Plaintiff: *Reeves* v. *Baker* (9); *Brook* v. *Brook* (10). It might be difficult to say, during her life, what was the exact nature of the trust, as it was in *Crockett* v. *Crockett*; but now that she is dead it is clear that all which remains must go amongst the testator's family: *In re Parkinson's Trust* (11).

Mr. *Heath*, for another Defendant.

Mr. *Cotton*, Q.C., and Mr. *Warner*, for the Plaintiff.

Mr. *Bristowe*, in reply.

(1) Law Rep. 10 Eq. 267.
(2) 1 My. & Cr. 401.
(3) 1 Hare, 445.
(4) Ibid. 451; 2 Ph. 553.
(5) 3 K. & J. 529.
(6) 35 Beav. 291.
(7) 2 N. R. 16; 12 W. R. 554.
(8) 29 Beav. 657.
(9) 18 Ibid. 372.
(10) 3 Sm. & Giff. 280.
(11) 1 Sim. (N.S.) 242.

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SIR W. M. JAMES, L.J. :—

In this case my opinion is that the decision of the Vice-Chancellor is perfectly right. If this will had to be construed irrespective of any authority, the construction would, in my opinion, not be open to any reasonable doubt.

It is the will of a man who was in business as a shopkeeper, and was, when he made his will, in the prime of life, with a wife and young children, and it is to this effect:—[His Lordship then read the will.] Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from tne wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise.

The testator intended his wife to remain head of the family, and to do what was best for the family. If he had said, "I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family"—in such a case it would be clear that the testator did not mean to tie the property up, but to give a share to each son, believing that he would do the best for his family.

But it is said that we are bound by authority. The cases cited may, however, be distinguished. In this will there is, in the first place, an absolute gift, and we have to be satisfied that this gift is afterwards cut down. It was also argued that in some cases, as in *Crockett* v. *Crockett* (1), the Court has decided there was some interest in the children, but did not declare what it was, leaving the matter to be dealt with after the death of the tenant for life.

It is possible that in this case there may be some obligation on

(1) 2 Ph. 553.

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the widow to do something for the benefit of the children; but assuming that there is such an obligation, it cannot be extended to mean a trust for the widow for her life, and after her death for the children, in such shares as she may think fit to direct. That would be to enlarge the will in a way for which there is no foundation; but unless the will has that meaning, what trust is there? I cannot agree that she is to take what she likes, and that what she has not spent is to go at her death for the benefit of her children. In *Crockett* v. *Crockett* (1), it was only decided that the children had some interest, and if the widow fairly satisfied that obligation, and gave them some interest, nothing more could be required.

Then this case was said to be like *Godfrey* v. *Godfrey* (2). But there the Vice-Chancellor decided that there was an interest, though he did not define what that interest was:—[His Lordship then read and commented on the judgment in *Godfrey* v. *Godfrey*, and said that the *ratio decidendi* in that case was that there was a trust.] But it is impossible in this case to say that there was a trust. The testator clearly intended her to deal with the property as she pleased, and contemplated that she might risk it in his trade.

The other cases cited are merely illustrations of the same kind, and do not enable the Court to escape from the difficulty of having to decide upon the meaning of the word "family." It seems to me impossible to put any restriction upon the meaning of that word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. The word might include sons-in-law, or daughters-in-law, and many others. It is equally uncertain what the property is, because if she could spend any part for her own private purposes, then there might be nothing left for the trust.

14 Eq 57-3

It is impossible to execute such a trust in this Court, and if the case stood alone I should say that no sufficient trust was declared by the will. But if there be any such obligation, I think it has been fairly discharged by the way in which she has made her will —giving part for the benefit of one member of the family, and part to a natural son, whom she might reasonably think it her duty to benefit.

(1) 2 Ph. 553. (2) 2 N. R. 16; 11 W. R. 554.

It appears to me, that the decision of the Vice-Chancellor is right, and that the appeal must be dismissed.

SIR G. MELLISH, L.J. :—

I am of the same opinion. In order to reverse this decision we must think that the testatrix has exceeded the authority which was given to her.

Now I conceive that the proper course is to find out what this will means, and not to give the construction which we desire, but to ascertain what the testator desired. We may take into consideration his position when he made this will. He was in business as a shopkeeper, and had a wife and young children :—[His Lordship then read and commented on the terms of the will, and said that if the matter was unfettered by decision he should be inclined to hold it an absolute gift to the wife, with merely an expression of the testator's motives in doing so.] But suppose that these words do give the family some interest—what is that interest? It is impossible to hold in this case, as Lord *Cottenham* seems to have thought in *Crockett* v. *Crockett* (1), that the wife was tenant for life and the children entitled in remainder. It is quite inconsistent with a life estate that she should be able to dispose of the *corpus*. At all events, she was to determine the interest which each child was to take, and also her own, and I do not understand how a Court of Equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have.

I do not see why the wishes of the testator are not be followed. The Court might say that if she was giving the whole away she was not honestly executing the wishes of the testator; but even then I should have thought the words in this will too vague. I cannot, however, say that this lady has gone beyond what she was entitled to do, or has left more than she had a right to leave. Looking at the very general terms of the will, it is difficult to say that she was not right in providing for this illegitimate child. [His Lordship then read and commented on the judgments in *Woods* v. *Woods* (2), and *Crockett* v. *Crockett*, and said that if,

(1) 2 Ph. 553. (2) 1 My. & Cr. 401.

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as in *Crockett* v. *Crockett* (1), it was so very difficult to decide what interests the widow and children took, that shewed that the testator did not intend any decision to be made.] Here the words cannot be confined to management, for the wife had power to sell the *corpus* and spend it—she might spend it for the benefit of the children, but still she could spend it.

There is nothing here to shew that the widow has exceeded her power, and the appeal must be dismissed with costs.

Solicitors: Mr. *Dubois*; Messrs. *Rogers, Jull, & Rogers.*

L. JJ. 1871 *June* 10.

Ex parte ELLIS. *In re* KAIN.

Bankruptcy Act, 1869, s. 7—*Debtor Summons—Staying Proceedings.*

In January, 1870, *K.* commenced an action against *E.* for alleged breach of contract as to a piece of ground agreed to be demised by *E.* to *K.* In July *E.* commenced ejectment against *K.*, and in December obtained judgment, with costs exceeding £50. *E.* then, in February, 1871, took out a debtor summons against *K.* for these costs. *K.* applied to stay proceedings, alleging that he should recover a larger sum in the action, and that he believed the debtor summons was taken out to prevent his proceeding with the action; and the Registrar made an order staying proceedings:—

Held, on appeal, that the application ought to have been refused, for that the circumstances alleged did not, under the *Bankruptcy Act*, 1869, s. 7, support the application.

THIS was an appeal by a creditor from an order of Mr. Registrar *Brougham*, staying proceedings on a debtor summons.

On the 30th of April, 1868, *Kain*, who was a builder, entered into an agreement with *Ellis*, by which *Kain* was to build four houses on a piece of land belonging to *Ellis*. *Ellis* was to make him advances once a month to the amount of 70 per cent. on the cost of the work done, and on completion *Ellis* was to grant leases to *Kain*, *Kain* giving him mortgages for the amount of the advances. The work proceeded, and *Ellis* made advances to the amount of £750; his surveyor then refused to give *Kain* any certificate for more, alleging that *Kain* had not done enough to entitle him to anything further. *Kain* then abandoned the work, and on the 24th of

(1) 2 Ph. 553.

January, 1870, commenced an action against *Ellis* for breach of the agreement and for work done. *Kain* not expediting the proceedings in this action, *Ellis*, on the 28th of July, 1870, commenced ejectment against him, and on the 17th of December, 1870, recovered judgment with costs, which were taxed at £59 16*s.* 8*d.* On the 1st of February, 1871, *Ellis* took out a debtor summons for this amount. *Kain* then made an application under the *Bankruptcy Act*, 1869, s. 7, to discharge this summons on an affidavit stating that the work done by him on *Ellis's* land had been valued by two surveyors at £3280, on account of which he had only received £750: that *Ellis* was indebted to him in a much larger sum than the claim under the debtor summons; and that the bankruptcy proceedings were, as he believed, oppressively taken in order to prevent his proceeding with the action against *Ellis*.

Mr. Registrar *Brougham*, on the 14th of March, 1871, made an order "that all proceedings under the above-mentioned summons be stayed until after the Court in which the proceedings for the recovery of the debt alleged to be due from the said creditor to the said debtor are pending shall have come to a decision thereon; and in case the debtor fails to use all diligence in the prosecution of his action against the said creditor, then the said creditor is to be at liberty to apply to this Court to proceed with the proceedings under the above-mentioned summons."

Mr. *Reed*, for the appeal motion:—

Kain's application to discharge the summons was under sect. 7, par. 2, of the *Bankruptcy Act*, 1869. Such an application can only be made on one of two grounds—that there is no debt due, or no debt to a sufficient amount. The debtor here alleges neither one nor the other, but says he has brought an action, and seeks to set off the damages which he may recover in it. If the proceedings had been stayed only on payment of the £59 16*s.* 8*d.* into Court, the creditor would not have objected to the order.

Mr. *Bradford*, in support of the order:—

The Court has a general jurisdiction to suspend the proceedings before itself, and it will do so where justice requires. The Registrar thought it was not reasonable that the Respondent should be called

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Ex parte ELLIS. *In re* KAIN.

upon summarily to pay this money when there was a cross demand of far larger amount, upon which no decision had been come to.

SIR W. M. JAMES, L.J.:—

I do not mean to lay down any such rule as that it is impossible to suspend proceedings on a debtor summons; but the doing so is a very different thing from refusing an adjudication of bankruptcy, which may be refused on various grounds. The Act says that a creditor to whom a certain amount is due may take out a debtor summons, and if the debtor does not do certain things he is to be deemed to have committed an act of bankruptcy. The debtor has a right to apply to the Court on certain grounds mentioned in the Act, and on those only, to dismiss the summons; or he may give security, and ask to have the proceedings stayed pending the trial of the question relating to the debt. The present debtor's application to dismiss the summons purported to be made under that section, but it was made without the materials to support it. The Registrar seems to have proceeded under the general jurisdiction of the Court to restrain its proceedings from being used for an improper purpose, and to have gone on the ground that the proceedings in the present case were taken for the purpose of defeating an action by the debtor against the creditor. But that question will more properly be considered when adjudication is applied for, and I think that the Registrar ought not to have interfered till then.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The application by the debtor was made on grounds which, in my opinion, do not support it. . . I see no reason why the costs of the ejectment should not be recovered, nor why the creditor's remedies should be suspended to await the result of an action against him by the debtor, which has been pending for many months, and which the debtor has taken no pains to bring to trial. The application ought, in my opinion, to have been dismissed.

Solicitors for the Plaintiff: Messrs. *G. & W. Webb.*
Solicitor for the Respondent: Mr. *H. I. Coburn.*

Ex parte DUIGNAN.
In re BISSELL.

L. C.
and L. JJ.
1871
July 26.

Bankruptcy Act, 1869, ss. 6, 125—*Liquidation—Act of Bankruptcy—Filing Petition for Liquidation—Vesting in Trustee.*

The filing of a Petition for liquidation by arrangement in the form prescribed by the Bankruptcy Rules, 1870, is an act of bankruptcy, and the vesting of the debtor's goods in the trustee relates back to the filing of the Petition; so that an execution creditor, with notice of the Petition, cannot seize the goods of the debtor, and hold them as against a subsequently appointed trustee.

Order of *Bacon*, C.J., affirmed.

IN this case a debtor had, on the 4th of November, 1870, under the *Bankruptcy Act*, 1869, filed in the form prescribed by Rule 252 of the Bankruptcy Rules, 1870 (1), a Petition for liquidation by arrangement. Before a trustee under the liquidation was appointed, some of the debtor's goods were seized by the sheriff for creditors who had notice of the Petition, and were sold by the sheriff to the creditors.

The Judge of the County Court ordered the creditors to deliver the goods to the trustee, and this order was affirmed by Chief Judge *Bacon*, as reported (2), where the facts are fully stated.

The creditors appealed. On the appeal the facts were admitted, and the only question argued was, whether the property of the debtor vested in the trustee on his appointment, or by relation back on the filing of the Petition.

Mr. *De Gex*, Q.C., and Mr. *Everitt*, for the Appellants:—

We contend that the property does not pass out of the bankrupt until the appointment of a trustee; and we deny that filing the petition is an act of bankruptcy. Sect. 125 of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71) clearly contemplates two periods,

(1) By the Bankruptcy Rules, 1870, as to liquidation by arrangement under sections 125 and 126 of the *Bankruptcy Act*, 1869, Rule 252 provides that: "Proceedings under these sections shall be instituted by the debtor by petition and affidavit thereto annexed, according to the forms given in the schedule." And Form 106 of the schedule is that of a Petition by a debtor, one of the allegations in which is, "That your Petitioner alleges that he is unable to pay his debts."

(2) Law Rep. 11 Eq. 604.

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and only two, in the liquidation—the commencement when the trustee is appointed, and the close. The 4th and 7th sub-sections are clear. The Act is very definite in fixing the commencement of the bankruptcy, and the commencement of the liquidation is equally definite. It may be inconvenient, but the Court cannot control the Act. Nor is there any harm, for, under sect. 13, a receiver can be immediately appointed, and the debtor will be restrained from parting with his property. The relation back is only under sect. 11, and will not be extended by the Court. This is now the only Act, and the notions derived from the former Acts must not be applied to wrest the plain meaning of this Act. If there is no relation back, it will be dealt with as under the old law: *Newnham* v. *Stevenson* (1); *Monk* v. *Sharp* (2). Nor is the filing of the Petition an act of bankruptcy. A liquidation is different from a bankruptcy, and has a different proceeding and a different result.

Mr. *Little*, Q.C., and Mr. *Reed*, for the trustee, were not called upon.

LORD HATHERLEY, L.C.:—

We are all of opinion that the construction put upon this Act by the learned Judge is correct. In fact, any other construction would frustrate the provisions of the Act which relate to liquidation by arrangement.

The construction contended for by the Appellants would prevent sect. 13 of the Act from having any operation; for no creditor would take the trouble to avail himself of it.

Moreover, one of the acts of bankruptcy specified in sect. 6 is a declaration filed by the debtor in the prescribed manner, admitting his inability to pay his debts. And by sect. 11 the bankruptcy is made to relate back and commence at the time of the act of bankruptcy being completed. Then sect. 125 shews who it is who may take advantage of liquidation by arrangement, and it is a person who is unable to pay his debts; and the 78th section provides that the Rules made by the Lord Chancellor in the manner therein mentioned shall have the same force as if they were enacted in the body of the Act. Now, Rules have been made, and

(1) 10 C. B. 713. (2) 2 H. & N. 540.

the 252nd prescribes the form in which the debtor is to proceed in liquidation, and the schedule to the Rules gives the form of the Petition he is to present, in which he must allege that he is unable to pay his debts. There is no reason why the Court should not impose such a condition; it is only following the provisions of sect. 125; and, moreover, by sub-sect. 12, if there are difficulties in liquidation by arrangement, the Court may adjudge the debtor a bankrupt. He must, therefore, have committed an act of bankruptcy, or else that section would be nugatory.

Any other construction would prevent all liquidations by arrangement, for the creditors would never meet as was intended. Until a trustee had been appointed the debtor would be able to dispose of his property as he thought fit; and the property might be seized by any creditor, as the filing of the Petition would be a signal to every one.

The declaration of insolvency being the only ground on which the Court could proceed, it would be reasonable that it should be placed on record. The effect of the decision in *Monk* v. *Sharp* (1) is, that there was not in that case a clear act of bankruptcy, and the statutory jurisdiction had not arisen.

It was argued that presenting this Petition was not available for an adjudication in bankruptcy; but it can be used for that purpose; and if the creditors had not availed themselves of it in the first instance, still, if wanted, it will be available, and is now available.

There was only one real difficulty suggested, which was with respect to the commencement of the liquidation under sub-sect. 4 of sect. 125, enacting that "the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee;" and it was argued that this must govern sect. 11, because sect. 15 says that the property divisible amongst the creditors shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy."

Upon this it was said that we are to read "commencement of the liquidation" as meaning "commencement of the bankruptcy," so that the trustee only took the property of the bankrupt at the time when the trustee was appointed.

(1) 2 H. & N. 540.

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But this would be straining the words of the Act against the spirit in every direction. Sub-sects. 5 and 7 of sect. 125 provide that the property of the debtor shall be vested in the trustee, and distributed as in bankruptcy; but on that construction this clause would be nugatory as applied to the interval between the act of bankruptcy and the appointment of the trustee, and so would sect. 13, which provides for the protection of the property. And what creditor would allow the liquidation to go on when the filing of the Petition would be a signal to every creditor to rush in and lay hold of anything he could seize, when there would be no means of having it fairly distributed among the creditors?

The whole object of the Act is, that the debtor's property shall be fairly distributed among his creditors. If the debtor and his creditors prefer to make a private arrangement, they are enabled to have the property applied in the course of a liquidation, and are not to be driven into bankruptcy.

I think that the learned Judge has come to a reasonable conclusion, that the presentation of the Petition is an act of bankruptcy, and that everything which a trustee in bankruptcy would take would vest in the trustee under the liquidation; and being so vested, it is not competent to those creditors who have before the sale received notice of the Petition, to assert their rights to the injury of the other creditors.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. One of the acts of bankruptcy is "filing in a prescribed form a declaration of insolvency," and the form prescribed for a petition in liquidation includes such a declaration. I can conceive no object for which that clause could be required in the Petition, except that it should amount to the statutory declaration of insolvency. It is clear, therefore, that there was an act of bankruptcy, and if that act of bankruptcy had been followed by adjudication, which may still be done, then all this property would have gone for division among the creditors, being part of the debtor's property at the time. That would have been the result in bankruptcy. There was no bankruptcy here, but it seems to me clear that the liquidation by arrangement is only different in the machinery by which the same object is to be

obtained; and the creditors are not to be in a worse position because they prefer dealing with the property themselves instead of dealing with it under the Court of Bankruptcy. The intention of the Act is, that the same property shall be given to the creditors in each case.

It was an act of bankruptcy, and took the property at that time from the debtor for distribution among his creditors in whatever way they might choose to distribute it.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Under sect. 125, sub-sect. 1, the creditors have the option of making the debtor a bankrupt or of having a liquidation by arrangement, and the words imply that if they do not come to a special resolution there is to be a bankruptcy. But they cannot make the debtor a bankrupt, unless there has been an act of bankruptcy; otherwise the only choice they would have would be to liquidate his affairs by arrangement or to let him go on as he did before. The Rule is framed so as to carry the Act into effect, making the Petition in a form which necessarily involves an act of bankruptcy. It also appears clear that sub-sect. 5 means that the property which vests in the trustee shall be the same as would vest in bankruptcy if the creditors chose to make the debtor bankrupt, which would include all the debtor's property, unless some creditor had seized it without notice.

No doubt the words of sub-sect. 4 do create some difficulty, but they cannot control the other parts of the Act, which clearly made the property vest in the trustee as in bankruptcy.

Petition of appeal dismissed with costs.

Solicitor for the Appellants: Mr. *C. G. Rushworth*, agent for Messrs. *Duignan & Co., Birmingham.*

Solicitor for the Respondent: Mr. *J. M. Green*, agent for Mr. *J. Rowlands, Birmingham.*

L. JJ.
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May 22.

JESTON *v.* KEY.

Marriage Articles—Marriage Contract—Default by one Party—Condition precedent.

By articles made previously to a marriage, the wife's father covenanted to make certain payments during his life, and to settle three-tenths of his real and personal estate at his death upon the husband and wife during their respective lives, and after their death on their issue; and the husband covenanted to insure his life and to settle the policy, and also other property, in like manner. In default of issue, the property settled by the husband was to revert to him. The marriage took place, and the wife died without issue, and afterwards the father died. The husband did not insure his life or settle his property as agreed, and refused to execute the settlement which had been drawn in pursuance of the articles.

A suit having been instituted for the administration of the father's estate, the husband claimed to prove for the value of his life interest in three-tenths of the father's real and personal estate:—

Held (affirming the decision of the Master of the Rolls), that it was no answer to the husband's claim that he had refused to perform his part of the agreement, inasmuch as the contract between the parties had been partly performed by the marriage, and the performance by the husband was not a condition precedent to the performance by the father. The claim was therefore allowed.

THIS was an appeal from a decision of the Master of the Rolls, made in a suit for the administration of the estate of *J. W. Jeston*.

By articles under seal, made in contemplation of the marriage of *W. O. Stoton* and his wife, dated the 11th of July, 1860, which recited that it had been agreed that the testator, who was the father of the intended wife, should pay to the intended husband £600 on the day of marriage, and should make the wife an allowance of £50 a year for three years to come, and should settle three-tenths of the real and personal estate of which he might die possessed, and that the husband should settle the sum of £2000 out of some property to which he was entitled under his father's will in reversion expectant on the death of his mother, and should insure his life against the life of his mother and that of the testator in the sum of £1000, and should also settle whatever, at the time of his death, or ceasing to carry on his business of a solicitor, might be due from his present or any future business; it was witnessed that, in contemplation of the intended marriage, and for

making some provision for the husband and wife during their respective lives, and for their issue, if any, it was agreed between the parties thereto that the testator should pay the sum of £600, and make the allowance of £50 thereinbefore mentioned, and that each of the parties thereto should, within three months after the marriage, do all things necessary for vesting in trustees the property thereinbefore mentioned, upon trust for the husband during his life, and after his death for the wife during her life, and after the death of the survivor, for their issue; and in default of issue, then as to the husband's fortune in trust for such persons as he should by deed or will appoint, and in default of appointment for his next of kin; and on corresponding trusts, *mutatis mutandis* as to the property settled by the testator. It was also declared that the settlement should contain a clause of forfeiture of the husband's life interest on bankruptcy or alienation.

The marriage shortly afterwards took place, and the testator paid the sum of £600, and made the allowance of £50 a year during his daughter's life.

Mr. *Stoton*, the husband, however, did not insure his life, and raised objections to the settlement in the form in which it was prepared. In March, 1861, he wrote a letter to the testator's solicitor, in which he said that if the modifications of the settlement which he wished were not adopted, he would execute no settlement unless compelled to do so by the Court. In August, 1861, he sold his share in his business, and applied the purchase-money to his own purposes.

In February, 1862, Mrs. *Stoton* died without having had any issue, and without having executed her power of appointment over her fortune.

In February, 1869, the testator died, having by his will directed his executors to pay whatever might be due under the marriage articles.

The present suit having been instituted by his son, who was one of the residuary legatees, for the administration of his estate, Mr. *Stoton* claimed a life interest in three-tenths of the testator's estate.

The Master of the Rolls allowed the claim; and from this decision the Plaintiff and the testator's executors appealed.

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Mr. *Roxburgh*, Q.C., for the Plaintiff, and Mr. *Romer* (Mr. *Southgate*, Q.C., with him), for the executors:—

The articles were an executory contract, the consideration for which has failed. As between the husband and his wife's father, the marriage was not the only consideration; the mutual settlements formed an important part of it. The performance of the contract by the husband was a condition precedent to the husband taking any benefit from his father-in-law's covenant. This is, in fact, an attempt by the husband to obtain specific performance of an agreement, without himself offering to perform his part. If the wife or children were alive, the settlement might have been enforced for their benefit; but here there is no person to be benefited except the husband. There is no case on record in which a husband has enforced the performance of marriage articles after the death of his wife without issue. In the present case the husband repudiated the articles, and refused to execute a settlement in conformity with them, and he cannot now take advantage of them.

[They referred to *Feversham* v. *Watson* (1), *Mitford* v. *Mitford* (2), *Crofton* v. *Ormsby* (3), *Perkins* v. *Thornton* (4), and *Lloyd* v. *Lloyd* (5).]

Mr. *Jessel*, Q.C., and Mr. *Freeling*, for the claimant, were not called on.

SIR W. M. JAMES, L.J.:—

This appeal has been brought under an entire misapprehension of the rules of this Court. Marriage articles were executed under which the husband became entitled to certain benefits secured to him by the covenant of the wife's father. The marriage took place, and the husband now seeks to obtain those benefits in a suit for the administration of the estate of the wife's father as a debt which is due to him under the covenant. The Appellants say, in answer to the husband's claim: "You did not perform your part of the agreement, and you refused to carry the settlement into effect." But that is no answer either at law or in equity. If there was

(1) Finch, 445.
(2) 9 Ves. 87.
(3) 2 Sch. & Lef. 583.
(4) Amb. 502.
(5) 2 My. & Cr. 192.

anything for the husband to do in which third parties were interested, the Court would take care that he obtained no benefit until he had performed his part of the agreement. But there is nothing for him now to do in which any other party could take any benefit. The case is perfectly plain, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There was a marriage contract between the husband and the wife's father. They both agreed to make a settlement, and this agreement was not performed by either party. But the contract was partly performed by the marriage; and, as a matter of law, it appears to me quite clear that the performance by one party was not a condition precedent to his right to claim against the other; but that each side would have a right to claim damages against the other for breach of his agreement. By reason of the death of the wife without issue nobody can suffer any damage from the husband's failure to perform his part of the agreement. Why, then, should he not recover against the wife's father for not performing his part? The settlement was not at an end; and indeed, although there was a dispute between the parties, it was recognised by both parties as a subsisting settlement before the wife's death. If the husband had died leaving a wife or children, the father would have been entitled to have the settlement made good out of his estate; and now that the father is dead, the husband has a similar right to claim against his estate under his covenant.

Solicitors for the Plaintiff: Messrs. *Phillips & Son.*
Solicitors for the Claimant: Messrs. *Bell & Stewards.*

L. JJ. 1871 May 23.

SOUTHALL *v.* BRITISH MUTUAL LIFE ASSURANCE SOCIETY.

Amalgamation of Companies—Ultrà vires Agreement carried into effect by means of Winding-up—Companies Act, 1862, *s.* 161—*Mutual Insurance Company —Bonus to Directors.*

An unregistered company which has no power under its deed of settlement to sell and transfer its business to another company may, nevertheless, carry into effect an agreement for that purpose by registering under the *Companies Act*, 1862, and then passing a resolution for voluntarily winding-up, and directing the liquidator to carry out the agreement.

A mutual insurance company may be amalgamated with, and its business transferred to, another company under the 161st section of the *Companies Act*, 1862.

A clause in an agreement for the amalgamation of two companies, providing that part of the purchase-money shall be paid to the directors of the selling company by way of bonus :—

Held, not to invalidate the amalgamation.

Decision of the Master of the Rolls affirmed.

THIS was an appeal from a decision of the Master of the Rolls (1).

The suit was instituted by *Horatio Southall* and *Edgar Brooks*, on behalf of themselves and all other members of the *British Mutual Life Assurance Society* (hereinafter called the *Society*), except the Defendants the directors of the *Society*, against the *Society*, the directors of the *Society*, the *Prudential Assurance Company* (hereinafter called the *Company*), and the directors of the *Company*.

The *Society* was a mutual life insurance society, established in 1844, but governed by a deed of settlement, dated the 1st of January, 1851. The 79th and 80th clauses of the deed provided for the dissolution of the *Society* and division of the assets among the members, on a resolution passed by a majority of three-fourths at a general meeting ; but the deed contained no provisions for the amalgamation of the *Society* with, or the sale of the business to, any other company.

The Plaintiff *Southall* was the assignee of several life policies effected in the *Society*. The assignments contained covenants by

(1) Law Rep. 11 Eq. 65.

the assignors to pay the premiums on the policies. The Plaintiff *Brooks*, who was the assignor of one of the policies, was made a co-Plaintiff, in order to avoid any question as to the right of *Southall* to sue.

The *Prudential Assurance Company* was a proprietary company, and was governed by a deed of settlement of the 17th of January, 1861, under which the *Company* had power to purchase or otherwise acquire the business of any other company or companies, society or societies, of a similar nature. In addition to the ordinary business of life assurance, the *Company* had power to effect insurances in cases of sickness or accident.

On the 10th of October, 1868, a provisional agreement was entered into between the directors of the *Society* and the *Company* for the transfer of the business, assets, and liabilities of the *Society* to the *Company*. This agreement contained a clause providing that each of the directors should receive £600, and the secretary £5000, by way of compensation for loss of office. On the same day the directors of the *Society* issued a circular, calling a special meeting of the members on the 29th of October, for the purpose of considering the agreement; and also a general meeting on the same day to consider the expediency of registering the *Society* under the *Companies Act*, 1862. A copy of this circular was sent to the Plaintiff *Southall*, who immediately wrote to the secretary of the *Society*, stating that he objected to the proposed arrangement.

The meetings were duly held on the 29th of October, and resolutions were passed by large majorities of the members approving of the agreement, and sanctioning the registration of the *Society* under the *Companies Act*, 1862. On the 30th of October the *Society* was registered accordingly.

On the 17th of November a meeting was held, at which the following resolutions were passed by the majority required by the 51st section of the *Companies Act*, 1862:—

1. That the agreement made by the board of directors of the *Society* with the *Prudential Assurance Company*, dated the 10th of October, 1868, for the transfer of the business and the policies and assets of the *Society* to the *Prudential Assurance Company* be, and the same is hereby, approved and adopted.

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2. That the *Society* be wound up voluntarily.

3. That *E. H. Galsworthy*, Esq., be, and he is hereby, appointed liquidator of the *Society;* and he is hereby authorized, directed, and empowered to carry out and bring into operation the agreement entered into by the board of directors with the *Prudential Assurance Company*, dated the 10th of October, 1868.

These resolutions were duly confirmed at a meeting held on the 4th of December. The transfer of the business and assets of the *Society* was afterwards carried into effect, and the directors and secretary received the compensation stipulated in the agreement.

The bill was filed on the 10th of November, 1868, and prayed for a declaration that the agreement of the 10th of October, 1868, was beyond the powers of the *Society* and the *Company*, and was invalid and void; for an injunction to restrain the Defendants from carrying it into effect, and to restrain the directors of the *Society* from selling or transferring the business or assets of the *Society*, contrary to the provisions of the deed of settlement; for an order directing the *Company* to transfer the assets to the liquidator of the *Society;* for a declaration that the *Society* ought to be wound up, and its affairs dealt with in accordance with the provisions of the deed of settlement; and for an order for the directors to repay the sums received by them for compensation under the agreement.

Notice of motion for an injunction was given, but before the motion was heard the transfer of the business and assets was complete, and the motion was turned into a motion for decree. The Defendants alleged that the Plaintiff *Southall* was the only person who objected to the agreement, all the other members of the *Society* having accepted the liability of the *Company.*

The Master of the Rolls dismissed the bill with costs, and the Plaintiffs appealed from the decision.

Mr. *Jessel*, Q.C., and Mr. *Waller*, for the Appellants:—

The agreement was *ultrà vires* of the *Society*, even though it might be within the powers of the *Company.* It is not pretended that the *Society* had any power under its deed to enter into such an agreement. It would be a great hardship upon a member of the *Society* to oblige him to exchange his policy for a policy in a

company which is not a mutual company, particularly as the business of the *Prudential Company* is not confined to life assurances, but includes insurances against sickness and accidents and other risks.

It is, however, said that the transfer is valid under the 161st section of the *Companies Act*, 1862 (1). But even if the section is applicable to mutual insurance companies, which is very questionable, the transaction was really a fraud on the section, which was intended to be auxiliary to a *bonâ fide* winding-up, not to be the means of carrying into effect an *ultrà vires* agreement. The liquidator did not sell, nor exercise any discretion in the matter, but merely obeyed the directions given to him by the resolutions. No part of the purchase-money was paid to the members; the only persons who received benefit were the directors and the secretary of the *Society*. That part of the arrangement was itself enough to vitiate the agreement. The directors were to be paid by a fixed salary, and an agreement to pay them a bonus as part of the price of the amalgamation was *ultrà vires* and fraudulent. There were other clauses in the agreement which were *ultrà vires*—for instance, a proviso for referring matters in dispute to arbitration.

[The following cases were referred to: *Ex parte Fox* (2); *Ex parte Phillips* (3); *Clinch* v. *Financial Corporation* (4); *Andrews and Alexander's Case* (5); *Bowes* v. *Hope Mutual Life Insurance Company* (6).

(1) The 161st section, so far as it is material to the present case, is as follows:—

"Where any company is proposed to be, or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto participate in the profits of or receive any other benefit from the purchasing company."

(2) Law Rep. 6 Ch. 176.

(3) 3 De G. & Sm. 3.

(4) Law Rep. 4 Ch. 117.

(5) Ibid. 8 Eq. 176.

(6) 11 H. L. C. 389. 11 Jur. N.S. 643.

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Sir *R. Baggallay*, Q.C., and Mr. *Phear*, for the *British Mutual Society*, and Mr. *Southgate*, Q.C., and Mr. *Chester*, for the *Prudential Company*, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Master of the Rolls has come to a correct conclusion in this case. It must be borne in mind that the *British Mutual Society*, although a mutual insurance society, and therefore not like an ordinary joint stock company, except so far as it might contract a few necessary debts with outside creditors, yet was so constituted that it had the power of dissolving itself, and so putting an end to the contracts of assurance. It consisted of members, all of whom had effected policies, and they had the power of dissolving the *Society* by a resolution of a majority of three-fourths. The *Society* therefore was a company which had power to alter the whole character of the relation between itself and the policy-holders. I see nothing either in the letter or the spirit of the *Companies Act*, 1862, to prevent a company so constituted from being registered or, when registered, from being wound up voluntarily. That being so, it is expressly provided by the Act that it shall be no objection to the registration that it has been done for the express purpose of enabling the *Company* to be wound up. Then, having registered the *Company*, the shareholders passed resolutions for winding it up voluntarily. The necessary consequence of this was, that the assets were to be distributed according to the rights and interests of the members in the best way in which this could be done. The members determine that this shall be done by proceeding under the 161st section of the Act. It seems clear to me that that section contemplates just such a proceeding as this; for I cannot conceive what meaning can be attached to the expression enabling the liquidators "to receive in compensation policies in another company," unless the policies of the members were to be exchanged for a corresponding interest in another company. It is a mode of dealing which is expressly applicable to mutual insurance societies.

That being so, I think the whole transaction was in substance regular. All the members assented to it except the Plaintiff. He had a clear course open to him. He might have given notice to

the liquidator that he dissented from the resolution for amalgamation; and he might have claimed to have his interest valued, and the value paid to him in cash. He has not done so, but he chooses to apply to this Court for an injunction. The question then arises, whether, the matter being regular in substance, there is anything in the details which gives the Plaintiff a right to relief. It is said, in the first place, that it is a violation of the principles of this Court that the directors should have a bonus of £600 each. I agree that if this had been done secretly, in all probability it could not be supported. But it was done openly, and appeared on the face of the agreement. There was nothing in itself wrong in such an arrangement, and it was known to all the shareholders. They said: "We are going to get rid of the chairman and the directors, and we think it right that we should give them some compensation." It would be monstrous to say that a transaction otherwise reasonable could be vitiated by such a clause as this. Other clauses were also objected to, particularly the clause providing for the determination of differences by arbitration; but I am of opinion that none of them are of such a nature as to vitiate the agreement.

The transaction was, in my opinion, quite regular, and in accordance with the 161st section of the *Companies Act*, 1862. The appeal will therefore be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. At first I was struck by the objection that it was a hard thing that a member of a mutual insurance society should be obliged to take a policy in another company, or else be paid off and lose the benefit of his insurance. But when we look at the Act of Parliament, it is clear that it was intended to give to all companies which should register a power to put an end to their business. The only question, then, is, can a mutual insurance society register? The 180th section of the *Companies Act*, 1862, says that, with certain exceptions, which have no relation to this *Company*, every company existing at the time of the commencement of the Act, consisting of seven or more members, may register itself. This clearly includes mutual insurance companies; and if they may register, they may be wound up voluntarily under the 129th section. Then, by the 133rd section, the necessary con-

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sequence of their being wound up is, that their assets are to be distributed "among the members according to their rights and interests in the company." So that, entirely independently of the 161st section, the assets are to be distributed, as soon as the resolution to wind up is passed, among the persons entitled according to their respective rights. It is not, therefore, the 161st section which deprives the policy-holder of his right to have his policy continued, but the other provisions of the Act; that section only provides that instead of the liquidator being obliged to sell the assets for cash, he may exchange them for other things, such as shares and policies, which are to be distributed among the members of the selling company. I know no other company, except a mutual insurance company, the interest of whose members consists of policies. Therefore I am of opinion that the Act does enable the liquidator of a company which has complied with the conditions of the 161st section to sell the business and assets to another company on the terms of the members receiving policies of the purchasing company in lieu of their original policies.

In the present case the agreement really did nothing else than this. I agree with the Lord Justice in his observations on the details of the agreement. The clauses objected to were only subsidiary clauses necessary for carrying out the sale. In substance it was a sale of the assets on the terms that each member was to have a policy in the new company in lieu of his old one; and by the 161st section he has his choice whether he will dissent from or accept this arrangement. If the present claimant had dissented, he could have received the same sum as if the *Society* had been dissolved under the 80th clause of their own deed. Under that deed it might have been dissolved without his consent; and, as we have arrived at the conclusion that it can be wound up without his consent under the Act, there is no injustice in giving him the choice of a new policy or the value of his old one.

Solicitors: Mr. *A. D. Smith*, agent for Mr. *Oliver, Birmingham*; Messrs. *Barnard & Co.*

POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY COMPANY *v.* MINOR.

L. JJ.
1871
June 1.

Scheme of Arrangement—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127)—*Debenture Holder—Judgment Creditor.*

M., a debenture holder in a railway company, obtained judgment against the company for principal, interest, and costs. After this the company filed a scheme of arrangement under the *Railway Companies Act*, 1867, which was assented to by the requisite majority of the debenture holders, but not by *M.*, and was duly confirmed and inrolled. *M.* having afterwards proceeded to issue execution on his judgment, the company filed a bill to restrain him:—

Held (affirming a decision of *Malins*, V.C.), that *M.*, although he had obtained judgment, was still a debenture holder, and therefore bound by the scheme; and must be restrained from taking proceedings under his judgment.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Malins*.

The Appellant *Minor*, a debenture holder, obtained judgment against the *Potteries, Shrewsbury, and North Wales Railway Company* on his debentures; one judgment on the 12th of February, 1867, for £604; and the other on the 22nd of February, 1867, for £474. On the 23rd of February, 1867, he sued out a *fi. fa.* in respect of the second judgment, to which the sheriff of *Shropshire* returned *nulla bona*.

After the passing of the *Railway Companies Act*, 1867, the company filed a scheme of arrangement, which was confirmed on the 9th of May, 1868, by Vice-Chancellor *Malins*, and inrolled on the 12th of July, 1868. This scheme provided for each debenture holder receiving in lieu of his principal money and arrears of interest the like nominal amount of debenture stock.

Minor did not assent to the scheme, nor did he send in his debentures to be exchanged for debenture stock. On the 24th of September, 1868, he sued out a fresh *fi. fa.* under his second judgment, and placed it in the hands of the sheriff of *Shropshire*, who seized under it certain effects of the company. On the 20th of October, 1869, the company, on motion in the matter of the scheme, obtained an interim order from Vice-Chancellor *James*, as

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Vacation Judge, to restrain the sheriff from selling; and on the 18th of November, Vice-Chancellor *Malins*, on motion in the same matter, granted an injunction to restrain the sheriff from continuing in possession of the effects, and to restrain *Minor* from taking any further proceedings under his judgment, holding at the same time that, as the scheme did not in any way provide for *Minor's* costs at law, the company must pay them. This order was discharged by Lord Justice *Giffard* on the ground that the Court had no jurisdiction to make it without bill filed (1). The company then filed their bill, offering to pay *Minor's* costs at law, and praying that he might be decreed to exchange his debentures for debenture stock, that the sheriff might be restrained from seizing any of the effects of the company under the *fi. fa.*, and that *Minor* might be restrained from taking any proceedings under his judgments.

Minor, by his answer, stated that since the dates of his judgments he had never claimed to be a mortgagee under his debentures, but had abandoned all rights and claims under them, and claimed only such right as he was entitled to under his judgments, and that unless the Court should determine him not to be entitled to his full rights as a judgment creditor, he disclaimed all rights as a debenture holder, and asserted such rights only as he was entitled to under his judgments.

Vice-Chancellor *Malins* made a decree declaring *Minor* bound by the scheme, and granting an injunction as prayed. (a)

Mr. *Glasse*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

We contend that the Defendant is none the less a judgment creditor because he is a debenture holder, and that the Court has no jurisdiction to interfere with his rights as a judgment creditor. A mortgagee of a railway company, if he gets judgment, has all the rights of an ordinary judgment creditor: *Hart* v. *Eastern Union Railway Company* (2). The present point was not decided in *In re Potteries, Shrewsbury, and North Wales Railway Scheme* (1); there was only an intimation of opinion on the materials then before the Court. As judgment creditors, we are not

(1) Law Rep. 5 Ch. 67. (2) 6 Railw. Ca. 818; 7 Ex. 246.

(a) W.N. (1871) 19.

bound by the scheme: 30 & 31 Vict. c. 127, ss. 6, 10, 15, 18: *In re Cambrian Railways Companies Scheme* (1).

[The LORD JUSTICE MELLISH:—Is not *Bowen* v. *Brecon Railway Company* (2) against you?]

There the creditor was constructively a party to the suit, and the judgment was obtained after the filing of the bill.

[The LORD JUSTICE JAMES:—Suppose a mortgagee accepted another security in place of his mortgage, could he, after this, avail himself of a judgment? Your argument would seem to lead to this, that you can accept the debenture stock, and still enforce your judgment.]

We have disclaimed the stock.

[The LORD JUSTICE MELLISH:—It seems to deserve consideration, whether a majority of debenture holders who have not obtained judgment can bind a minority who have? Can they be looked upon as one class?]

We submit not. A class must mean a body of people standing on the same footing. The rights of a judgment creditor are illustrated by *Russell* v. *East Anglian Railway Company* (3) and *Potts* v. *Warwick and Birmingham Canal Navigation Company* (4).

Sir *Roundell Palmer*, Q.C., Mr. *Mackeson*, Q.C., and Mr. *Dryden*, for the company:—

The language of sects. 10 & 18 of the Act is plain. The mortgagees are bound, and the Appellant, to avoid this, attempts to split up the personality of the mortgagee, and say he is bound in one capacity and not in another. The scheme gives him stock, not a new debenture. The scheme has the force of an Act of Parliament, and nothing can take away his right to this stock. He, therefore, according to his own contention, is in this position: in his character of mortgagee he is entitled to this debenture stock, and in his character of judgment creditor retains his right to seize the rolling stock of the company. If this appeal succeeds, it

(1) Law Rep. 3 Ch. 278.
(2) Ibid. 3 Eq. 541.
(3) 3 Mac. & G. 125.
(4) Kay, 142.

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must be by overruling *Bowen* v. *Brecon Railway Company* (1). If the mortgage debt is gone, the judgment is gone: *Garrod* v. *Simpson* (2).

[The LORD JUSTICE MELLISH:—I feel some doubt whether a debenture holder who is in a different position from all the rest can be bound by the determination of the rest. Then as to the judgment failing with the debenture. Suppose a debenture holder had a collateral security—*e. g.*, a promissory note from the directors in their private capacity—would he lose that?]

We submit that he would. He receives stock in lieu of the debt, and all securities for the debt are extinguished: *Walker* v. *Jones* (3).

Mr. *Glasse*, in reply:—

Suppose, before the scheme, I had obtained a mortgage of the surplus lands, it would be monstrous to say that I was deprived of that security by the scheme; and the present case is substantially the same.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor is right. No doubt the Appellant is thus deprived of an advantage obtained by his greater diligence; but it appears to me impossible to split up the mortgagees into such classes as these—mortgagees who have issued execution, mortgagees who have merely obtained judgment, mortgagees whose principal is payable with an arrear of interest, mortgagees whose interest is in arrear, but whose principal is not yet payable—and to require the requisite majority of each of such classes to assent to the scheme. Unless such a classification can be made, there is only a single class of debenture holders, of which class the Appellant is a member, and none the less a member of it because he has obtained judgment. I cannot accede to the view that there is any case of election. If he was entitled to stand on his judgment, he was bound to do so, and the company must have refused to give him stock. In my opinion he was

(1) Law Rep. 3 Eq. 541. (2) 11 Jur. (N.S.) 227.
(3) Law Rep. 1 P. C. 50.

entitled to receive stock, and bound to accept it; after which his debt is gone, and he cannot avail himself of his judgment, which is only one of the securities for that debt. He is a member of a class of persons who have agreed to accept stock in satisfaction of their debts.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The question is, whether the Appellant was the holder of a mortgage or bond within the meaning of sect. 10? No doubt he was, and had all the rights of such—the right to have a receiver appointed, and all the other rights of a debenture holder. Is he, then, bound by the assent of a majority of the debenture holders, or not? If he is so bound, he is just in the same position as if he had assented in writing to the scheme; if he is not bound, his original rights remain—not only his rights as a judgment creditor, but his rights as a debenture holder, which appears to be quite opposed to the scope of the Act. It is argued that the judgment is a separate security, which other debenture holders have not got, and that he ought not to be deprived of it. The answer is, that every debenture holder has the power of getting judgment, and that there is very little difference between depriving him of this power and depriving him of the benefit of a judgment when obtained. It appears to me impossible to put a sensible construction upon the Act in any other way.

Solicitors: Mr. *S. F. Noyes;* Mr. *D. Aston.*

L. JJ.
1871
May 6, 27.

Ex parte LEWIS. *In re* HENDERSON.

Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36)—*Apparent Ownership—Formal Possession.*

14 L.T. 180
9 W.R. 292.
9 Ch. 702
20 L.T. 751.
1 C.L.D. 456
5 Ch.D. 812-3
19 Ch.D. 423.

On the 29th of November, *L.*, the holder of an unregistered bill of sale of the household furniture of *H.*, took possession by sending in a broker's man, who remained in the house and slept in an upper room, but did not remove any of the furniture nor interfere with the use of it by *H.*, who went on using it exactly as before. On the 19th of December placards were posted in the neighbourhood of the house announcing a sale of the furniture on the 28th, but, with the exception of a reference to a firm of solicitors for particulars, there was nothing in the placards from which it could be inferred that the sale was not made by *H.* himself. On the 23rd *H.* committed an act of bankruptcy, and was adjudged bankrupt on the following day :—

Held (affirming the decision of the Registrar), that the goods belonged to the trustee in bankruptcy, as being in the apparent, if not the actual, possession of the bankrupt, for that the possession taken by the broker's man was merely "formal possession," within the meaning of the *Bills of Sale Act*, 1854; and that the placards could not take the furniture out of the bankrupt's apparent possession, as they did not shew that the sale was to be made under a bill of sale.

THIS was a motion by *James Lewis*, the holder of a bill of sale, by way of appeal from an order of Mr. Registrar *Brougham*, sitting as Chief Judge, holding the bill of sale to be void, and directing the goods comprised in it to be sold for the benefit of the creditors.

On the 3rd of November, 1870, *Henderson* executed the bill of sale in question, being an assignment to *James Lewis* of all the goods, chattels, furniture, fixtures, utensils, and effects in or about *Henderson's* dwelling-house, 3, *Church Street, Kensington*, by way of mortgage, to secure £1000, with interest. This bill of sale was not registered under the *Bills of Sale Act*. On the 25th of November *James Lewis* gave instructions to *F. Lewis*, an auctioneer, to take possession of the property comprised in the bill of sale. On the 29th of November possession was accordingly taken by sending a broker's man named *Pollock*, who went into the house with the bill of sale, and took formal possession of the furniture and effects, remained in the house nearly the whole of each day, and slept at night in a room at the top of the house, but did not remove any of the things, nor in any way interfere with *Henderson's* continuing to

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use them as he had done before, and *Henderson* continued to reside in the house, everything to all appearance going on as usual. Things continued thus till Saturday, the 17th of December, when the auctioneer went to *Henderson's* house, and walked over it with an inventory of the furniture, but did nothing more. Some correspondence had previous to this taken place as to the bill of sale being given up upon certain terms, but the negotiation having ended in nothing, handbills were, on the 19th of December, posted up in the neighbourhood of the house, but not on the house itself, advertising a sale of the goods on the 28th. These handbills merely shewed what the property sold was, and where and when it was to be sold, and referred to the auctioneer and to Messrs. *Lewis, Munns, Nunn, & Longden* for particulars, but did not shew whether the sale was directed by *Henderson* himself or by some one else. It was also sworn to that, on the 21st, the billsticker posted a copy of the handbill on the house between the two parlour windows, and that one of *Henderson's* servants immediately afterwards took it down by his orders. About this, however, there was some conflict of evidence, the bankrupt denying that any bill was posted on the house till after Christmas. On the 22nd of December *Henderson* signed a declaration of insolvency, and consented to an adjudication in bankruptcy against himself, on a petition filed on that day by *J. Ladyman*, and on the following day he was adjudged bankrupt, the circumstances as to the possession of the furniture having remained unaltered. On the 27th of December an *ex parte* injunction was granted by the Court of Bankruptcy to restrain a sale till after the 3rd of January. This injunction was several times renewed, and ultimately, on the 9th of February, 1871, the order under appeal was made on the application of the trustee in bankruptcy.

The appeal was opened on the 6th of May, but stood over till the 27th, that the bankrupt, the auctioneer, and *Pollock* might be examined *vivâ voce*.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the Appellant:—

No doubt, if the property remains in the apparent ownership, the bill of sale is ineffectual, but neither under the *Bills of Sale Act* (17 & 18 Vict. c. 36) nor under the Bankruptcy Acts is it neces-

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sary to turn the mortgagor out. The mortgagee must either register the bill of sale or take possession. Merely formal possession, it is true, is not enough; but here there was more than formal possession. The goods were taken out of the control of the mortgagor, and the posting up of the bills of sale put an end to the appearance of his being owner. According to the authorities, enough was done: *Gough* v. *Everard* (1); *Smith* v. *Wall* (2). The cases under the reputed ownership clauses furnish an analogy in our favour: *Belcher* v. *Bellamy* (3); *Vicarino* v. *Hollingsworth* (4).

Mr. *Kay*, Q.C., and Mr. *Doria*, for the trustee in bankruptcy, were not called upon.

SIR G. MELLISH, L.J.:—

This is an appeal from an order made by the Registrar in Bankruptcy, which declared that the property included in a bill of sale made by the bankrupt belonged to the trustee under the bankruptcy, and not to the holder of the bill of sale. The question turns upon the construction of the *Bills of Sale Act*, 1854 (17 & 18 Vict. c. 36).

On the 3rd of November, 1870, the bill of sale in question was executed. On the 25th of November instructions were given to an auctioneer to take possession of the goods, and on the 29th possession was taken by sending in a man named *Pollock*, who has been examined before us. According to his account, he went into the bankrupt's house with the bill of sale in his pocket, and said that he had come to take possession of the furniture, but he did not remove any part of it. He lived in the house, he slept there in an upstairs room, and stayed there all day, except that he went out for exercise, but he did not interfere with the use of the furniture by the bankrupt, who continued to use it just as he had done before the possession was taken. So things went on until Saturday, the 17th of December, when the auctioneer, Mr. *Frank Lewis*, went to the house, and having obtained an inventory, which appears to have been made by the bankrupt, looked round the premises, and probably examined the furniture with the inventory.

(1) 2 H. & C. 1.
(2) 18 L. T. (N.S.) 182.
(3) 2 Ex. 303.
(4) 20 L. T. (N.S.) 362.

but did nothing further to take possession. On the 19th of December, bills announcing an intended sale of the furniture on the 28th of December were posted in the neighbourhood, but not upon the bankrupt's house itself. It is said that on the 21st of December (there is a dispute as to this, but it is not a matter of much consequence) one of these bills was posted upon the front of the bankrupt's house between the windows, but was taken down immediately by one of the bankrupt's servants. The bankrupt denied that any bill was posted upon his house until after Christmas. The next day the bankrupt committed an act of bankruptcy, and on the 23rd of December he was adjudicated a bankrupt. In this state of circumstances the question is, whether, upon the true construction of the *Bills of Sale Act*, these goods came within the 1st section of the Act, as being at the time of the bankruptcy "in the possession or apparent possession of the person making such bill of sale." The question is, Were these goods on the day on which Mr. *Henderson* became bankrupt, in his possession or in his apparent possession? The interpretation clause of the Act throws some light upon the meaning of "apparent possession," although it does not give a full definition of the term: "Personal chattels shall be deemed to be in the 'apparent' possession of the person making or giving the bill of sale so long as they shall remain or be in or upon any house or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." In this case it is plain that the goods did remain in a house occupied by the bankrupt, but I quite agree with the decision of the Court of Exchequer in *Gough* v. *Everard* (1), that the mere fact of their remaining in the house is not of itself fatal to a bill of sale if they have ceased at the date of the bankruptcy to be in the actual or apparent possession of the bankrupt. Baron *Bramwell* says in that case: "I construe this clause to mean that the goods shall be deemed in the 'apparent possession' of the vendor so long as they are on the premises occupied by him, if nothing more has been done than the mere taking formal possession; but that where, as in the present case, far more than mere formal possession has been taken,

(1) 2 H. & C. 1, 12.

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the clause does not apply." The Judges, however, have not defined what that something more must be. But in both the cases which have been cited, the person to whom the bill of sale was given had come into actual possession of the goods, had got possession not only of the goods, but of the premises in which the goods were. In *Gough* v. *Everard* (1), Chief Baron *Pollock* said: "I am of opinion that the possession of the Plaintiff, the vendee of the goods, was so complete that the provisions of the statute do not apply. The timber at the public wharf was completely under his control; it was in his possession as far as it was capable of being, and it was not in the possession of the vendor. As to the timber on the private wharf, the Plaintiff had actually sold a part of it; the key of the wharf had been delivered to him, and he had manual control over the timber. The furniture in the house was as much in his possession as it could be." The other case, *Smith* v. *Wall* (2), shews more completely what sort of facts will take the case out of the statute. The facts are thus stated in the judgment of Chief Baron *Kelly*: "The Plaintiff had advanced to one *Young*, an execution debtor, £155 on the security of a bill of sale of his goods. *Young* was by trade a baker. There was a defect in the affidavit of registration of the bill of sale, but the Plaintiff proved at the trial that he had taken possession of the goods comprised in the bill of sale by putting a man into possession of them in the house of *Young* on the 15th of May; that the doors were kept locked, and the trade and business stopped; that on the 17th of May printed notices announcing a sale by auction of the goods were posted outside the house, and in places about the neighbourhood; the catalogue was given in evidence, and it stated that the sale was to take place under a bill of sale on the 24th of May. *Young*, the debtor, who was an infirm old man, remained on the premises contrary to the officer's wishes, as he said he could not get lodgings elsewhere." The facts of that case, compared with those of the present case, shew exactly what is necessary to make the possession taken by the person claiming under a bill of sale good as against the trustee in bankruptcy of the maker of the bill of sale. In *Smith* v. *Wall*, the man who took possession did not simply go to live in the house and sleep at the top of it, leaving the goods in

(1) 2 H. & C. 1, 8. (2) 18 L. T. (N.S.) 182, 184.

the possession of the mortgagor just as before, but locked up the rooms containing the bulk of the furniture, and tried to turn the mortgagor out of the house. As, however, the mortgagor was an old man, and said he could not get a lodging elsewhere, he allowed him to sleep there, but exercised control over all the rest of the house. In that case, moreover, the bills announcing the intended sale of the goods, stated that the sale was to be made under a bill of sale. Here they contained nothing more than an announcement that certain property would be sold at a certain time and place, without a word to shew that it was not a sale by Mr. *Henderson* himself of his own furniture, except that the bill stated that catalogues were to be obtained from Messrs. *Lewis, Munns, & Co.*, solicitors, *Old Jewry*, and a person who understood such matters would probably guess, from this reference to solicitors, that the case was not that of a man selling his own furniture. I do not, however, think that enough, and I am of opinion that if bills announcing a sale are to be relied upon, as taking the goods out of the possession, or the apparent possession, of the bankrupt, they ought to contain a statement that the sale is to be made under a bill of sale. The terms of the "reputed ownership" clause in the Bankruptcy Acts are very different from those of the clauses in the *Bills of Sale Act*. Under the former, the real owner of the goods might make his title good as against the assignee in bankruptcy, by an unsuccessful demand of possession of the goods before the bankruptcy. The Appellant in the present case might have registered his bill of sale, and his not doing so shews that he wished to keep it secret, the very thing against which the Act was intended to guard. It appears to me that the possession by *Pollock* was merely that which the Act calls "formal possession," and was of no effect, and that the bills announcing a sale of the goods by auction, even if they had been posted upon the house in which the goods were, would not have been enough to terminate the possession of the bankrupt, inasmuch as they did not shew that the sale was to be made under a bill of sale. I am inclined to think that the goods in this case remained at the time of the bankruptcy in the actual possession of the bankrupt; but if not, I am clearly of opinion that they remained in his apparent possession, and consequently that the trustee under the bankruptcy is entitled to them.

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SIR W. M. JAMES, L.J.:—

I entirely concur; and I may add that I agree in the judgments in both the cases at law which have been cited. The appeal will be dismissed with costs.

Solicitors: Messrs. *Lewis, Munns, & Longden*; Mr. *J. R. Tindale.*

L. JJ. 1871 *May* 6, 27 *June* 3.

Ex parte KINGSTON. *In re* GROSS.

Trust Account—County Rates—County Treasurer—Bankers' Lien.

G., a county treasurer, used to pay the county moneys into the *B. Bank*, but kept his private account at the *N. and P. Bank*, and carried over the police rates to this account by cheques drawn on the *B. Bank*. In February, 1869, he opened a separate account with the *N. and P. Bank*, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The cheques which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the *N. and P. Bank* treated the accounts as one account, and the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened, the manager of the bank knew that *G.* was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. On the 8th of April, 1870, *G.* absconded, his private account being overdrawn, and the police account being in credit:—

Held (affirming the decision of the Chief Judge in Bankruptcy, who had reversed the decision of the County Court Judge), that the bank was not entitled to set off the one account against the other, but that the county magistrates were entitled to recover the balance standing to *G.*'s credit on the police account.

THIS was an appeal by the *National and Provincial Bank* from a decision of the Chief Judge, holding them not entitled to set off the amount by which the bankrupt's private account with them was overdrawn against the balances standing to his credit on other separate accounts.

Gross was a solicitor at *Ipswich* in large practice. In 1860 he was appointed treasurer of the county rates for the eastern division of *Suffolk*, and entered into a bond, with sureties, conditioned that he "should well and truly account for all sums of money received

and paid by him by reason or on account of his said office, and should make due payment of all such orders as should from time to time be made or ordered by the Court of Quarter Sessions, and should faithfully discharge all the trusts reposed in him by the said appointment." The office of county treasurer was created by statute 12 Geo. 2, c. 29, s. 6, which directs security to be given to the above effect, and provides that all sums of money paid to the treasurer under the Act shall be "deemed and taken to be the public stock," and that the treasurers shall pay so much of the money in their hands to such persons as the justices shall order at general or quarter sessions, for purposes to which the public stock of a county is applicable by law. The statute 2 & 3 Vict. c. 93, s. 20, directed payment of the police out of the county rates, and authorized a special rate for that purpose, but did not contain anything to put the treasurer in any different position as to this rate from that in which he stood as to the general county rates. His duties were to receive the county moneys, make out of them such payments as the magistrates directed, and account at the quarterly audits held by them.

During the whole time that he was county treasurer, *Gross* kept his private account with the *National and Provincial Bank*. Most of his accounts as county treasurer he kept at *Bacon's Bank*. Part of his duty as treasurer was to receive the police rates, and pay the police through their several superintendents. For a long time he mixed the police rates with his own private moneys at the *National and Provincial Bank*. It appeared from the evidence that the general county rates and police rates were in each case paid to him together by a single cheque, which he used to pay into *Bacon's Bank*, and the police rate was carried over to his account at the *National and Provincial Bank* by cheques drawn by him on *Bacon's Bank*. In February, 1869, he opened a separate account with the *National and Provincial Bank*, which was headed,

"*The National Provincial Bank of England,*

Dr. In account with Contra Cr.

Benjn. L. Gross, Esq., Solicitor, *Ipswich.*

Police Account."

After which all cheques drawn on that account had "Police" or "Police Account" written on them. Previous to this he had

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opened with the bank in 1868 a separate account, headed "Superannuation Fund." The payments which he had to make in this respect were payments to disabled members of the police force. He also kept another separate account with the same bank, headed "Special Account."

The manager of the *National and Provincial Bank* admitted that he knew *Gross* to be county treasurer, and had an idea that *Gross* paid county moneys into the bank. He said that *Gross*, on opening the police account, had told him that for his own convenience he wished the account kept separate, and that he (witness) did not believe that *Gross* was opening the account as county treasurer, but understood that it was merely a separation of the account as a matter of convenience to *Gross*. He stated that he did not remember precisely what passed at the interview.

The police account was opened on the 1st of February, 1869, and no item to *Gross's* credit appeared in it till the 26th, but in the meantime he had drawn cheques upon it to the amount of £665 0*s.* 11*d.* On the 26th of February there was entered to *Gross's* credit in this account the sum of £295 5*s.* 6*d.*, which arose from a cheque drawn by him on his private account, and several large sums were afterwards similarly carried over to his credit in this account from his private account, the last being £604 7*s.* 3*d.*, under the date of the 7th of April, 1870, and entered in the police account as "Balance of Rates." Some of the sums entered to his credit could be traced as having been county moneys, but the greater part could not. On the 8th of April, 1870, the balance to *Gross's* credit on the police account was £2609 16*s.* 8*d.* It did not appear that *Gross* ever drew cheques on this account for any but county purposes.

No sums appeared to have been carried to *Gross's* credit in the superannuation account from his private account after the police account was opened, but several were carried over to it from the police account. The balance standing to *Gross's* credit in this account on the 8th of April, 1870, was £362 13*s.* 10*d.*

On the 8th of April, 1870, *Gross's* private account was overdrawn to the amount of £973 18*s.* 7*d.*, and the "Special Account" was overdrawn £1729 3*s.* 5*d.*

For the purposes of interest all the accounts which *Gross*

kept with the *National Provincial Bank* were treated as one account, and the interest was carried to the credit of his private account.

On the 8th of April, 1870, *Gross* committed an act of bankruptcy by leaving *England* to avoid his creditors, and on the 14th of July he was adjudged bankrupt.

On the 20th of August Sir *Shafto Adair*, on behalf of himself and the other magistrates of *East Suffolk*, took out a summons to establish their title to the moneys standing to *Gross's* credit on the police and superannuation accounts. *Gross* was indebted to the county on the police account, £2433 5*s.* 2*d.*, an amount, it will be seen, somewhat less than the balance standing to his credit in the police account at the bank. On the superannuation account he was indebted precisely to the amount which he had standing to that account at the bank.

The bank opposed the claim of the magistrates, and claimed to treat all *Gross's* accounts as a whole, and retain out of the police and superannuation accounts the balance in which he was indebted to them on his private account and special account.

The Judge of the *Ipswich* County Court decided in favour of the claim by the bank (1). But ~~this decision~~ was ~~reversed~~ held on appeal (a)

(1) 1870. Nov. 16.

With respect to the question between the magistrates and the bank, I have felt very great doubt and difficulty in coming to a conclusion. No evidence was given as to the circumstances under which the "superannuation fund" account was first opened distinct from the general account in July, 1868. But with reference to the "Police Account," which, down to February, 1869, was amalgamated with *Gross's* general private account, it appears from the evidence of Mr. *Smith*, the manager of the *National and Provincial Bank* at *Ipswich*, that the police account was opened in February, 1869, at Mr. *Gross's* suggestion, and, as he stated, for his convenience; that Mr. *Gross* suggested the heading "Police Account," and stated that he would write "Police Account" upon the cheques drawn on that account to distinguish them, but it does not appear that anything was said, when it was arranged that the "Police Account" should be opened, as to what money should be placed to the credit of that account, or from what source it was to come; and it appears from the pass-book that the police account was at first overdrawn to the extent of £665 0*s.* 11*d.* before a single farthing was placed to the credit of that account. Mr. *Smith* admitted, indeed, that ever since he became manager he knew that *Gross* was county treasurer, and that it was his duty to receive and pay away county money, and that before the police account was opened he (*Smith*) had an impression that *Gross* paid in county money to his own private account. But there was

(a) See W.N. (1871) 29.

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by the Chief Judge in Bankruptcy, and from his decision the present appeal was brought.

no sufficient evidence to satisfy my mind that Mr. *Smith* knew that the balances standing from time to time to the credit of the police account were composed either altogether, or to any particular amount, of county money; and from the evidence of Mr. *Ransome*, for many years Mr. *Gross's* clerk, it appears that *Gross* received the general county rates and the police rates from the treasurers of the unions by single cheques for the amount of both rates, and that he (*Ransome*) generally took and paid in such cheques to Messrs. *Bacon & Co.'s Bank*, but that he never took any of those cheques to the *National and Provincial Bank*; and Mr. *Ransome* further stated, that to his knowledge *Gross* paid money from his own private account to the credit of the police account, and paid county money into his own private account, and that he believed it was *Gross's* habit just before every audit to make up the balances of the general county account at Messrs. *Bacon & Co.'s*, and of the police account at the *National and Provincial Bank*, to their proper amounts, so as to correspond with the accounts to be audited. It further appeared from Mr. *Smith's* evidence that at each half-yearly rest since the police account was opened, the interest upon all the accounts were calculated, and that the interest upon the credit balances was set against that on the overdrawn balance, and the balance of such interest, according as it was in *Gross's* favour or against him, credited or debited in his private account. Such being the facts as to the opening and general state of the police account, the question is, does the decision in *Bodenham* v. *Hoskyns* (21 L. J. (Ch.) 864) apply to the police account now in question. And after much consideration, I have come to the conclusion that it does not. First, because the money paid to the credit of that account was sometimes county money and sometimes *Gross's* own money, and because there is no sufficient evidence to shew that Mr. *Smith* knew what was and what was not county money of that paid in; secondly, because, as to interest, all the accounts kept by *Gross* at the *National and Provincial Bank* were treated as one account; and thirdly, because originally the police account and *Gross's* private account were one account, and were afterwards divided merely for *Gross's* private convenience, and not for any benefit to the bank; with reference to which last ground I find the following passage in Vice-Chancellor *Kindersley's* judgment in *Bodenham* v. *Hoskyns*. After referring to the depositions, he says: "I confess it does appear to me that the use of the word 'introduce there, which occurs more than once, is important. It is evidently not the splitting of a pre-existing account for the mere convenience of the individual keeping the account. It was holding out to the bankers, or a conception on the part of the bankers that there was held out to them, the introduction to them, that is, the opening with them, of some account which would be for their benefit." From this passage I do not think it an unfair influence to draw, that had the *Rothwas* estate account been originally amalgamated and kept as one with *Parkes's*, the receiver's own private account, and the accounts had afterwards been separated for *Parkes's* own private convenience, the Vice-Chancellor's decision might have been different. I am of opinion, there-

Mr. *De Gex*, Q.C., Mr. *Little*, Q.C., and Mr. *Gibbs*, for the Appellants:—

In order to support the order under appeal, three propositions must be established: first, that *Gross* was a trustee; secondly, that the moneys in question were the trust moneys; and, thirdly, that the bank had notice of this. As to the first, it cannot be maintained that a county treasurer is a trustee: he is rather in the position of a banker, his duty being to make payments for county purposes according to orders, and to account for his receipts. He is at liberty to make profit by the use of the moneys, which negatives his being a trustee: 12 Geo. 2, c. 69, s. 6; *Crauford* v. *Attorney-General* (1); *Lord Melville's Case* (2). And in this case the Chief Judge held *Gross* to be entitled to the interest payable on the balances. The statute 23 Geo. 3, c. 50, alters the position of some public accountants and makes them trustees, and similar changes have been made by various local Acts: 2 & 3 Vict. c. 87, ss. 7, 8; 2 & 3 Vict. c. 88, ss. 6, 7; 2 & 3 Vict. c. 95, ss. 6, 7. No such alteration has been made as to county treasurers. The statute 2 & 3 Vict. c. 93, s. 20, directs payment of the police out of the county rate, and authorizes a rate for that purpose, but leaves the treasurer on the old footing. Had the Legislature meant to make him a trustee of these rates, it would have said so. Another criterion is, that a county treasurer, although he may have placed the moneys received by him in a bank of undoubted solvency at the time, or taken such other care of the moneys as he would of his own, or as a trustee is bound to take of trust moneys, is nevertheless liable to replace them, if lost through the failure of the bank or otherwise. An opinion to this effect has lately been given by counsel of the greatest eminence, and acted upon by the parties in a case where a bank, at which a county treasurer kept his account, failed. Next, it must be shewn that the balance claimed consisted of trust moneys. They must be traced into the account. That was done in the very few instances in which bankers have been held under very special circumstances to be liable: *Pannell* v.

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fore, that the *National and Provincial Bank* had a lien upon the balances now in question, and is entitled to retain so much of them as will balance all *Gross's* accounts treated as one account.

(1) 7 Price, 1, 78.

(2) 29 State Trials, 1470.

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Hurley (1); *Bodenham* v. *Hoskins* (2). An account cannot be a trust account unless its existence is communicated to the *cestui que trust*: *Wallwyn* v. *Coutts* (3). The mere fact of a trustee putting apart in his drawer for the purpose of making good a breach of trust a sum of money of his own, and labelling it with the title of the trust, does not, in the event of his bankruptcy, make that sum the property of the *cestui que trust*: *Wilson* v. *Balfour* (4). The *ratio decidendi* in *Bodenham* v. *Hoskins* and *Pannell* v. *Hurley* does not affect us, for in both those cases the *cestuis que trust* had notice of the trust account; and, moreover, the bankers had clear knowledge that the fund consisted of traceable trust money. This is an essential circumstance, and if it were not held to be so, the result to bankers would be most alarming. To fix them with responsibility, they must, by the title of the account, undertake it. This they had done in the only two cases relied upon below on the other side, viz., *Pannell* v. *Hurley* and *Bodenham* v. *Hoskins*. In the former, Vice-Chancellor *Knight Bruce* intimated that the mere title of the account is not enough. At all events, where the title is in the treasurer's private character, with only some distinguishing word, that cannot be sufficient to impose upon the bankers the difficult and dangerous duty here sought to be imposed on them; a mere separation of accounts at a bank for the convenience of the customer cannot have such an effect as is here contended for: *Sims* v. *Brittain* (5); *Ex parte Pearce* (6).

Mr. *Eddis*, Q.C., Mr. *Philbrick*, and Mr. *Davey*, for the magistrates of *East Suffolk*, were not called upon.

Mr. *Hardy*, Q.C., and Mr. *Cutler*, appeared for the trustee in bankruptcy.

SIR W. M. JAMES, L.J.:—

This case has been argued with a courage, a pertinacity, and a learning which it has been melancholy, in my judgment, to see thrown away upon a case so utterly hopeless. A gentleman was

(1) 2 Coll. 241.
(2) 21 L. J. (Ch.) 864; 2 D. M. & G. 903.
(3) 3 Mer. 707.
(4) 2 Camp. 579.
(5) 4 B. & Ad. 375.
(6) 2 M. D. & D. 142.

the treasurer of a county: in that character he had to receive moneys belonging to the county and connected with the police, and he had to make expenditure for the county in that character and out of those funds. For a long time he had mixed those moneys with his private moneys at his bankers. Being then minded (probably because he felt that he might fall into pecuniary difficulties) to do what it was his plain and obvious duty as an honest man to do, to keep the public stock of the county not mixed up with his own, and to avoid the liability to which trustees are subject who deal improperly with trust funds, he opened a distinct account, and headed it "Police Account," which heading, to my mind, was as clear and distinct a statement that the moneys paid into it were moneys belonging to the county, as if he had put the county moneys into a strong box labelled "County Moneys;" and when he failed, the moneys standing to that account were, in my opinion, as much county moneys as if they had been kept in such a box as I have suggested. The bankers opened the account, and dealt with the account, knowing that it was a county account. The fact that, when his private account was overdrawn, he drew from it sums made up of pounds, shillings, and pence for the purpose of paying them in to the police account, conclusively shews that he paid, out of moneys which his bankers were willing to lend him, the moneys which he knew to be due from him to the county. The fact that the amount standing to his credit in the police account is rather more than the balance which is found due as between him and the county, appears to me to be immaterial, and simply arises from his having made, on behalf of the police fund, payments for which he had not taken credit. In my mind this case is infinitely stronger than those referred to during the argument, in which a similar claim on the part of bankers was disallowed, for in those cases the banker relied on cheques drawn by the customers; and if a banker receives from a customer holding a trust account a cheque drawn on that account, he is not in general bound to inquire whether that cheque was properly drawn. Here the customer has drawn no cheque, and the bankers are seeking to set off the balance on his private account against the balance in his favour on what they knew to be a trust account. I am of opinion that the appeal ought to be dismissed, and dismissed with costs.

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SIR G. MELLISH, L.J.:—

I am of the same opinion; and I will only add that, in my opinion, we are not really doing any prejudice to bankers by establishing a rule that, if an account is in plain terms headed in such a way that a banker cannot fail to know it to be a trust account, the balance standing to the credit of that account will, on the bankruptcy of the person who kept it, belong to the trust. The banker need not open such an account unless he pleases; when his customer asks him to open it, he is at liberty to decline; and if the customer, when his general account is overdrawn, asks that it may be further overdrawn for the purpose of paying money into the trust account, the banker is entitled to refuse such accommodation. The only consequence of our acceding to the argument of the Appellant would be that, whenever a trustee or a public accountant, who intended to behave like a honest man, knew that there was some risk of his failure, and wished to keep public moneys or trust moneys separate, he would be obliged to go to some other bankers, in order to be really safe. That would be a disadvantage to his bankers, for, generally speaking, bankers consider it very advantageous to have public accounts, because such accounts are generally in credit to a considerable amount, and they know at what particular periods the money will be drawn out. As regards the question whether these are trust moneys or not, it really is quite impossible to avoid seeing that they are, when we read the 6th section of 12 Geo. 2, c. 29, which expressly states that they are to be treated as public stock; and I do not think that the mere circumstance of the treasurer being allowed to make a profit from them is at all a conclusive argument to the contrary. The fact is, that when these old Acts were passed, it was always considered that the obligation was only to account for the actual sums received, and the rule which the Court of Chancery applies to ordinary private trusts, that a trustee shall not make a profit of his office, was not considered applicable to public trusts of this nature.

Solicitors: Mr. *E. Bromley;* Messrs. *Wilde, Wilde, Berger, & Moore;* Messrs. *Peacock & Goddard.*

In re LONDON SUBURBAN BANK.

L. JJ.
1871
May 4.

Winding-up—Limited Company—Smallness of Interest of Petitioner—Shareholder—Companies Act, 1862, *s.* 79.

A company was formed, with limited liability, having a capital of £50,000, in 10,000 shares, of which 2300 were taken, and calls made to the amount of £4 per share. A holder of five shares, on which £4 per share had been paid, presented a Petition for winding up the company, alleging it to be unable to pay its debts. The great body of shareholders were opposed to a winding-up:—

Held (affirming the order of *Malins*, V.C.), that the Petition ought to be dismissed, for that the Court had a judicial discretion as to ordering a winding-up on the Petition of a shareholder, and ought not, in the case of a limited company, to make the order against the wish of the bulk of the shareholders on the application of a person whose interest and liability were so small.

THIS was an appeal petition from an order of Vice-Chancellor *Malins*, dismissing with costs a Petition for the winding up of the *London Suburban Bank, Limited.*

The company was registered on the 8th of May, 1868, under the *Companies Act*, 1862, as a company with limited liability. The capital was £50,000, divided into 10,000 shares of £5 each; 2300 shares had been subscribed for, and calls made to the amount of £4 per share. The Petitioner was the holder of five shares, on which the £4 per share had been paid. The Petition alleged that the company was unable to pay its debts, even if the whole uncalled-for capital were paid up; but that nearly two-thirds of the shares allotted were held by persons of no means, who were under the control of the promoter and manager of the company, and that he was, therefore, able to prevent any resolution for a voluntary winding-up from being carried. The great body of shareholders were opposed to a winding-up, and appeared by counsel to oppose the Petition. The Petitioner was cross-examined on his affidavit in support of the Petition, but before he could be re-examined the Petition came on before Vice-Chancellor *Malins*, who declined to allow it to stand over for the re-examination, and dismissed it with costs.

L. JJ. 1871 *In re* London Suburban Bank.

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for the Appellant:—

Our evidence is incomplete, owing to a delay in the cross-examination, and we ought to have an opportunity of completing it.

[The Lord Justice James:—Before we give you that opportunity, you must satisfy us that a shareholder in a limited company who can at most only be called upon for payment of £5, has a right, *ex debito justitiæ*, to have the company wound up against the wish of a large majority of shareholders. How can we believe the application to be made *bonâ fide?*]

The interest of the Petitioner is small, but this is in substance a proceeding on behalf of himself and the other shareholders, in which case smallness of interest is no bar; and the Court will only look to the question whether the circumstances of the company are such that it ought to be wound up.

[They referred to *In re European Assurance Society* (1) and *In re West Surrey Tanning Company* (2).]

Mr. *Higgins*, for a large body of shareholders, and Mr. *Cotton*, Q.C., and Mr. *Bradford*, for the company, appeared to oppose the appeal, but were not called upon.

Sir W. M. James, L.J.:—

The Petition in this case was presented for winding up a small company, with limited liability, in which, on the Petitioner's own shewing, he has no beneficial interest, as he alleges it to be unable to pay its debts, and in respect of which his only liability is to be called upon to pay a sum not exceeding £5. As soon as these circumstances were made patent to the Vice-Chancellor, I am of opinion that it was within his discretion to put a stop, as he has done, to all further expense, by dismissing a Petition the presentation of which could not be for the benefit of the company or of the Petitioner, and the proceedings under which could serve no other end than that of squandering in costs the trifling assets of the company. The case of a company with unlimited liability would be open to other considerations.

(1) Law Rep. 9 Eq. 122. (2) Law Rep. 2 Eq. 737.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. When a creditor who cannot obtain payment of his debt comes here for a winding-up order, the Court no doubt must, *ex debito justitiæ*, make it, if he brings the case within the Act. But the 79th section is not compulsory; and I think it clear that, if the application is made by a shareholder, the Court ought to exercise a judicial discretion. Here the assets appear not to exceed £9000, and the debts are considered to amount to more than £5000. If a winding-up order were made, the assets would probably be swallowed up in costs, so that the creditors who, if the company are allowed to manage their affairs for themselves, may receive something, would get nothing. This accounts for the circumstance that no creditor has come forward to ask for a winding-up. The appeal must be dismissed with costs.

Solicitors: Messrs. *Churchill & Hordern*; Messrs. *Rooks, Kenrick, & Harston*.

THAMES PLATE GLASS COMPANY *v.* LAND AND SEA TELEGRAPH CONSTRUCTION COMPANY.

L. JJ.
1871
May 8.

Winding-up—Leave to proceed.

Where the Judge in whose Court a company is being wound up has, under the *Companies Act*, 1862, s. 87, given leave to a Plaintiff to proceed with a suit against the company, the Court of Appeal will not interfere with the discretion of the Judge.

IN June, 1870, the *Thames Plate Glass Company*, as vendors, filed a bill in the Court of the Vice-Chancellor *Stuart* against the *Land and Sea Telegraph Construction Company* for specific performance of a contract to purchase; and on the 23rd of June an injunction was granted restraining the Defendants from continuing an action at law for the deposit. Interrogatories were filed by the Plaintiffs on the 24th of June. On the 21st of July the *Telegraph Company* passed a resolution for a voluntary winding-up; and on the 5th of August an order was made to continue the winding-up under the supervision of the Court.

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On the 20th of December the Vice-Chancellor *Malins* gave the Plaintiffs liberty to enforce an answer, being of opinion that, under the circumstances, the balance of convenience was in favour of allowing the suit to go on until answer. But he directed that no further proceedings should be taken without leave, as reported (1).

The Defendants put in an answer denying the contract and alleging fraud.

The Plaintiffs then applied to the Vice-Chancellor *Malins* in the matter of the winding-up and in the suit, for leave to proceed, offering to consent to have the suit transferred to the Court of the Vice-Chancellor, and to have it brought on immediately.

The Vice-Chancellor gave the Plaintiffs leave to proceed. The Defendants appealed.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the Appellants:—

The questions in this suit can all be as well decided in the winding-up, and ought to be so. It is the intention of 25 & 26 Vict. c. 89, s. 87, that all questions should be decided in the winding-up. The answer is on record, and we are as much bound by it as if the suit continued. The proceedings in winding-up will be cheaper and quicker. This suit was commenced before the winding-up order, and there is no instance in which a suit under those circumstances has been allowed to proceed.

Mr. *Cotton*, Q.C., and Mr. *Cracknall*, for the Plaintiffs, were not called upon.

SIR W. M. JAMES, L.J.:—

This is a matter so very much in the discretion of the Court below, that the order made in that Court ought not to be varied.

The *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 87, says, that "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose." That means the Court charged with the winding-up; and the Judge of that Court having full knowledge of the subject, it appears

(1) Law Rep. 11 Eq. 248.

(a) See W.N. (1871) 60.

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to him that the thing should be disposed of upon the issue raised on the bill and answer, and not upon a case raised by a summons. It appears to me also, that every contested question is far more complicated in Chambers by affidavits and adjournments into Court, and that you are more likely to have delay in Chambers than in Court. I am not disposed to interfere with the decision of the Vice-Chancellor.

The Vice-Chancellor will, no doubt, give leave to advance the cause when transferred to him.

This application must be refused with costs.

SIR G. MELLISH, L.J.:—

Where a matter has been left by the Legislature to the discretion of the Court, we ought not to interfere with that discretion when exercised by the Vice-Chancellor.

Appeal dismissed with costs. The cause by consent to be transferred to the Vice-Chancellor *Malins*, and the parties to consent to an application to advance the cause.

Solicitors: Messrs. *Watkins, Baker, & Baylis;* Messrs. *Tilleard, Godden, & Holme.*

PREES *v.* COKE.

L. C.
1870
Dec. 14, 15.
1871
Jan. 17.

Foreclosure—Final Order—Receipt of Rents—Setting aside Deed.

Where a solicitor and mortgagee took a conveyance from the mortgagor, a day labourer, who had no independent legal advice:—

Held, that the deed was not valid unless the circumstances were all explained to the mortgagor, and that the onus of shewing that this was done lay on the solicitor.

A foreclosure is not complete until the final order has been made, and the final order cannot be obtained if rents have been received by the mortgagee since the account was taken.

Decree of *James*, V.C., affirmed, with a variation.

REES PREES, the Plaintiff in this suit, was, in 1847, owner of certain land for a term of years dependent on lives, subject to a mortgage for £500 to *R. P. Leeson*. In 1847, *R. P. Leeson*, the

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mortgagee, filed a bill for foreclosure against *Rees Prees*. In 1849 the usual decree was made; the Master found that the sum of £686 was due for principal, interest, and costs; and appointed the 21st of June, 1849, for redemption.

The order confirming the report was made absolute on the 3rd of May, 1849. Default was made in payment, but the final order was not obtained. This was probably on account of the death of the mortgagor, which took place on the 2nd of August, 1849, or because (as appeared to be the case) the mortgagor had in the interim received rents.

W. Leeson, the son and representative of *R. P. Leeson*, or his solicitor *H. S. Coke*, had taken and remained in possession of the land, and in 1854 they attempted to sell it, when, as it seemed, the defect in the title was discovered. *H. S. Coke* appeared to contemplate a purchase, and he thereupon went to the Plaintiff, who was a day labourer in poor circumstances, and represented (as the Plaintiff stated) that his interest was of no value, and the Plaintiff agreed to sell his interest in the land and in a policy on the lives in the lease to *Coke* for £50. Accordingly, by an indenture dated the 29th of March, 1854, the Plaintiff, in consideration of £50, purported to assign or underlease to *Coke* all the lands comprised in the lease, and also the policy, subject to the mortgage for £500. The Plaintiff appeared to have had no independent professional advice, but he was the only person connected with the transaction who now remained alive: he was nearly eighty, and his memory was very defective.

In 1857 an indenture was made between *W. Leeson* of the one part, and *H. S. Coke* of the other part, whereby the mortgage on the lands was transferred by *W. Leeson* to *H. S. Coke*. *H. S. Coke* died in 1867, and this bill was filed in 1868 against his representatives by the Plaintiff, who alleged that he had only lately discovered his rights in the matter.

The bill prayed that the deed of 1854 might be set aside, and only stand as a security for the £50 and the money paid for premiums on the policy, and asked for an account with annual rests, and that the amount found due to the Plaintiff might be paid to him, he offering to pay any balance which might be found due from him.

The Vice-Chancellor *James* made a decree setting aside the deed of 1854, and for redemption. The Defendants appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Marten*, for the Appellants:—

We contend that the foreclosure was complete, even without the deed; and that the deed is valid if the foreclosure is incomplete. Even if the mortgagee was negligent in omitting to obtain the final order, he can now obtain it. As to the foreclosure, the final order was probably not obtained on account of the death of *Leeson*, but the foreclosure is complete without it. The decree has been made, and the final order is a mere record. A foreclosure is unlike any other decree; it leaves things as they were, and is merely a declaration by the Court that the Court will not interfere to enable the mortgagor to redeem. The default, and not the decree, gives the mortgagee his title. It is clear that the mortgagee could have obtained the order if he had taken the trouble, and he could have no object in not doing so. It is now said that the mortgagee had been in possession and had received rents in 1854, which had made a difference in the account, but that is not alleged in the bill; and that he could not then, and cannot now, obtain a final order without giving another day; but if that was true, he could still obtain his final order: *Garlick* v. *Jackson* (1); *Alden* v. *Foster* (2); *Ellis* v. *Griffiths* (3); *Constable* v. *Howick* (4). The only reason why a mortgagee who has received rents cannot obtain a final order is, that he cannot make the affidavit which seems to be required. There is no evidence to shew that the rents received would have exceeded the interest, or have made any difference in the account; nor is there any evidence of the value. The Plaintiff has waited till every one else is dead, and now comes and gives evidence which cannot be trusted. The lapse of time alone would be enough to prevent the Court from opening the foreclosure: *Gregory* v. *Gregory* (5); *Senhouse* v. *Earl* (6); *Reynoldson* v. *Perkins* (7). Even if there was any default in the title under the foreclosure,

(1) 4 Beav. 154.
(2) 5 Ibid. 592.
(3) 7 Ibid. 83.
(4) 5 Jur. (N.S.) 331.
(5) Coop. G. 201.
(6) 2 Ves. Sen. 450.
(7) Amb. 563.

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the deed cures it and is good; and even if the deed is set aside, the mortgagee remains where he was under the foreclosure, and the payment of £50 and the execution of the deed by the mortgagor cannot put the mortgagee in a worse position than if no deed had been executed and nothing done.

Mr. *Kay*, Q.C., and Mr. *Fischer*, for the Plaintiff:—

Default in payment will not alone deprive a man of his right to redeem. There must be a decree of the Court in proper form to deprive him: *Buchanan* v. *Greenway* (1); *Flack* v. *Longmate* (2). The fact that receipt of rent prevents a mortgagee from obtaining the final order, shews that the final order is not a matter of course. In 1854 the mortgagee must have been in possession for five years, and must be taken to have received rents, so that he cannot obtain his final order. After the mortgagee died, an order to revive would have been necessary, and before that could be done, no doubt rents had been received, and then the affidavit could not be made, and no final order could be obtained: *Nanny* v. *Edwards* (3). The usual decree for foreclosure does not bind the mortgagor, and only gives the mortgagee a right to apply for a final order. Even then the mortgagor can redeem: *Ford* v. *Wastell* (4); *Patch* v. *Ward* (5); *Thornhill* v. *Manning* (6). The deed of 1854 is clearly void, as the mortgagor was an ignorant man in poor circumstances, and could not have known what were his rights; but it amounts to a recognition of them in 1854 at all events. We maintain that the rents and the receipts from a part which has been sold have long ago paid off the whole debt.

LORD HATHERLEY, L.C., after stating the facts of the case, continued:—

In this state of things *Rees Prees* filed his bill to set aside the deed by which he conveyed the property in question to Mr. *Coke* for the sum of £50, and to have a reconveyance of the property made to him. The form of the prayer is not quite precise, but the Court is always anxious to do full justice where the Court can do it to all the parties concerned without another suit.

(1) 12 Beav. 355.
(2) 8 Ibid. 420.
(3) 4 Russ. 124.
(4) 2 Ph. 591.
(5) Law Rep. 3 Ch. 203.
(6) 1 Sim. (N.S.) 451.

One of the points strongly pressed against the decree which directs the deed to be set aside, and the mortgage accounts to be taken, and then a reconveyance if the mortgage-money should be found to be paid, is the time which has elapsed; and it is urged that Mr. *Coke's* executors cannot be in a worse position than if nothing had happened. But I am afraid they are. I say "afraid," because I doubt whether any one will get any benefit from this suit. If Mr. *Coke* had remained a mortgagee in possession, and nothing more had been said or done, and all things had gone on from 1849 without any steps taken, I apprehend that there would have been an amount of laches on the part of *Rees Prees* which would prevent the Court from giving him any relief with reference to the non-completion of the order for foreclosure. The Court has been indulgent to an extraordinary degree, as in the case of *Ford* v. *Wastell* (1), with reference to opening foreclosures, and to preserving the land as much as possible as the security simply of the money due; but such an amount of laches as that would be fatal.

Unfortunately for Mr. *Coke*, he was not content with his possession, but obtained this conveyance from *Rees Prees*, which purports to be a conveyance for £50 of the property subject to the equity of redemption, and by this *Rees Prees* may have been put to sleep, and led to imagine that he had no such right. [His Lordship then commented on the vagueness of the pleadings, and the want of any allegation in the bill that the property was worth more than the £50.] But if a solicitor and mortgagee, which is the position in which Mr. *Coke* presents himself, obtains a conveyance from the mortgagor, and the mortgagor is a man in humble circumstances without any legal advice, then the onus of justifying the transaction, and shewing that it was a right and fair transaction, is thrown upon the mortgagee. We have the evidence of *Rees Prees*, though from his failure of memory it would be unsafe to rely upon anything that he says, but it lies upon those who represent Mr. *Coke* to shew that this transaction was a righteous transaction. [His Lordship then commented on the evidence.] I cannot take it in favour of Mr. *Coke* that he made any further communication than what is on the deed, which represents in substance that the mortgage was in existence, and that the mort-

(1) 2 Ph. 591.

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gagor was selling his interest in the mortgaged property for the sum of £50.

Now if the burden is upon Mr. *Coke*, as I apprehend it is, of shewing that the transaction was right and fair, and he has not done so, then we must look a little further into the transaction. We find that, though the mortgage was being foreclosed, possession was taken. Thereupon a question arose, as to which I was very anxious to find a case in which it was shewn whether, if the mortgagee having entered at a time when he was entitled to an order to foreclose, the receipt of rents and profits would be imputed to him as a ground for opening the foreclosure, if he attempted, after the receipt of rents and profits, to make the foreclosure absolute. The only case cited was *Constable* v. *Howick* (1), before myself *ex parte*, when, regard being had to the right which would accrue to the mortgagee as of course to foreclose upon default, I thought that money taken by way of rents and profits after the day would not subject the mortgagee to the consequences which he would be subject to if he received it before the day. But that reasoning would not apply where the rents had been received before default had actually been made; and, although I find no authority expressly upon the point, I think that, looking to the extreme regard the Court has paid to the interests of the mortgagor, reserving to him to the last the power of redemption, I must come to the conclusion that the Court would hold the foreclosure opened by this receipt of rents and profits. Moreover, if the mortgagee had come in the year 1854, five years after he had entered, to make the order absolute, the Court would have required some explanation of the delay, and would require the person entitled to the equity of redemption to be served, in order to hear what he might say. I do not think that *Reynoldson* v. *Perkins* (2) meets this case. What Lord *Hardwicke* there said was, that a conveyance from a person entitled to the equity of redemption was equal to an absolute foreclosure by order, and that in a foreclosure suit the foreclosure against the tenant in tail would have bound all in remainder, and therefore his conveyance ought to have the same effect. And the logical consequence of that case is, that he regarded the suit as still pending.

(1) 5 Jur. (N.S.) 331. (2) Amb. 563.

It appears to me that the Plaintiff *Rees Prees* should have been told exactly what his interest was, that he could not then be foreclosed without further proceedings; and there is no proof that that was done. I confess that I almost regret to come to such a conclusion, because I see so little likelihood of any good resulting to anybody from all that is likely to be done in the proceedings which may be taken. [His Lordship then gave it as his decision that the decree for redemption should stand, but struck out a direction for annual rests, and made a variation as to the rate of interest to be charged, and directed that, in taking the account, the costs of the suit should be charged against the Defendants. No costs of the appeal.]

Solicitors: Messrs. *C. Sawbridge & Wrentmore;* Messrs. *Dod & Longstaffe.*

L. JJ.
1871
May 5.

RATCLIFFE *v.* BARNARD.

Equitable Mortgage—Deposit of Part of Deeds—Negligence—Legal Estate—Priority.

8 Ch 157.
7 H.L. 142-4
21 Ch.D 700-16

An equitable mortgagee, with whom some of the title-deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, filed a bill to establish his priority over a subsequent legal mortgagee, whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed, and purported to contain all the title-deeds, but contained only the earlier deeds :—

Held, that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge, so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee.

Decree of the Master of the Rolls affirmed.

THE Plaintiff in this case, *J. Ratcliffe*, in order to enable one of the Defendants, *J. Bywater*, to complete the purchase of certain lands at *Kirton*, advanced to him £700, with which he completed the purchase and took a conveyance. The deeds were given to *Bywater* in a parcel by *W. E. Howlett*, who acted as solicitor for the vendor and for the purchaser. The parcel was tied up in paper; *Bywater* took out four of the title-deeds, one being the conveyance to himself, and gave them to *Ratcliffe* as security for the £700.

In February, 1866, *Bywater* deposited the parcel containing the rest of the deeds with a banking company by way of security for an advance.

In April, 1866, *Bywater* purchased other lands from the Defendant *Barnard* for £5000, of which £4000 was secured by mortgage of these lands, and £1000 was to be secured by a mortgage of the lands at *Kirton*, *Howlett* also acting in this transaction as solicitor for both vendor and purchaser. Accordingly, *Bywater* gave *Howlett* a letter to the bank manager, with a cheque for £400, the amount due to the bank; and on the 1st of May, 1866, the bank manager, on receipt of the cheque, delivered the parcel of deeds to *Howlett*.

A mortgage to *Barnard* of the *Kirton* lands was then prepared by *Howlett*, and was executed on the 12th of May, 1866, and thereby, in consideration of the sum of £1000 expressed to be paid by *Barnard* to *Bywater*, the property in question was conveyed

to *Barnard* in fee, with the usual proviso for redemption on payment of £1000 and interest.

At the time when the mortgage was executed, *Howlett* had not opened or examined the parcel of deeds, and he did not discover till afterwards that the four deeds deposited with the Plaintiff were not in it. When this was discovered, *Barnard* filed a bill against *Bywater* and *Ratcliffe*, asking for the usual foreclosure decree against *Bywater*, for a declaration that his own charge was prior to that of *Ratcliffe*, and to have the deeds in *Ratcliffe's* possession given up to him. The suit came on before Vice-Chancellor *Giffard*, who held that *Ratcliffe*, as a *bonâ fide* equitable mortgagee, could not be made liable at the suit of a second mortgagee who had the legal estate, and that *Barnard* must either amend his bill and take the usual decree for redemption as against a prior mortgagee, or have the bill dismissed against him with costs. *Barnard* elected not to redeem.

The bill in the present suit was filed by *Ratcliffe* against *Barnard* and *Bywater*, and prayed a declaration that the Plaintiff was entitled to priority in respect of his equitable mortgage over the security expressed to be created by the mortgage deed of the 12th of May, 1866.

The Master of the Rolls held that in this case equity would not interfere to aid either party, but would leave them to their legal rights; and he dismissed the bill with costs.

The Plaintiff appealed.

Sir *R. Baggallay*, Q.C., and Mr. *W. Pearson*, for the Plaintiff:—

If *Barnard* had lent money on the faith of this security, without notice of our charge, he could avail himself of his legal estate; but he, by his solicitor, was guilty of so much negligence that he must be held to have had notice: *Hewitt* v. *Loosemore* (1). When a man, knowing that if he makes inquiry he will be bound by the information received, abstains from making inquiry, he is in the same position as if he had inquired. If a man makes an advance without inquiring for the deeds, he will be postponed to another equitable mortgagee who has obtained the deeds, and if he chooses to take a bundle of deeds without examining them, he is

(1) 9 Hare, 449.

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in the same position. Negligence so gross as this draws the same consequences as fraud. *Hunt* v. *Elmes* (1) is, in fact, in our favour when the grounds of the decision are examined. The negligence in this case is at least as great as it was in *Ware* v. *Lord Egmont* (2), *Dowle* v. *Saunders* (3), and *Colyer* v. *Finch* (4). At all events, the decree is wrong in dismissing the bill entirely, as the Plaintiff is certainly an equitable mortgagee.

Mr. *Jessel*, Q.C., and Mr. *Freeman*, for the Defendant *Barnard*, were not called upon.

SIR W. M. JAMES, L.J.:—

21 Ch D 706

This case is reasonably plain upon either of the two grounds. First, as to the alleged negligence, which is assumed by the Plaintiff to be a ground for postponing *Barnard*, who has got in the legal estate as security for a debt antecedently due. The Lord Justice *Turner* has, in *Hunt* v. *Elmes*, expressed the only principle upon which in this Court a man will have his legal security taken away. He must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. If a man abstains from inquiry under such circumstances that the Court will infer that he abstained in order to deprive himself of knowledge, then he will not be allowed to hold the property merely because he did not inquire. He has, in such a case, wilfully shut his eyes to the facts.

But, in this case, *Barnard* had a claim upon the owner of the property for £1000, and required security which *Bywater* the owner said he would give. He had property mortgaged to the bank, which would be available if the money was paid off to the bank. Then *Barnard* sent his attorney to the bank, and he received a parcel containing deeds, which were supposed to be all the deeds, and which the bank had taken as such, though in fact the deeds were not all there.

It seems to me that it would be a violent extension of anything which this Court has ever done, to say that a man is guilty of wilful negligence in such circumstances. The case is completely

(1) 2 D. F. & J. 578; 7 Jur. (N.S.) 200.
(2) 4 D. M. & G. 460. 10 Jun 871
(3) 2 H. & M. 242. 10 Jun
(4) 5 H. L. C. 905. 3 Jun

governed by *Hewitt* v. *Loosemore* (1), and appears to me as clear as possible. It is admitted that this, even as an equitable mortgage, would be good against the assignee in bankruptcy of *Bywater*, and it is a good equitable security accompanied by the legal estate. This is the very case in which the Court allows one of two equitable mortgagees to avail himself of the legal estate. The appeal must be dismissed with costs.

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SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitor for the Plaintiff: Mr. *W. P. Scott*, agent for Mr. *W. Plaskitt, Gainsborough.*

Solicitors for the Defendant *Barnard:* Messrs. *Rogerson & Ford*, agents for Messrs. *W. E. & B. Howlett, Kirton-in-Lindsey.*

McEUEN *v.* WEST LONDON WHARVES AND WAREHOUSES COMPANY.

L. JJ. 1871 May 26.

Company—Transfer of Shares—Scrip Certificates transferable to Bearer—Vesting of Shares.

The Plaintiff applied for shares in a joint stock company subject to the *Companies Clauses Act*, 1845, which were accordingly allotted to him, and he paid the allotment money, and his name was entered on the register of shareholders. After the allotment, the company sent him scrip certificates, transferable by delivery, with a statement that the allottee or bearer would be entitled to exchange them for share certificates. The Plaintiff sold his right to the shares to a purchaser, and delivered him the scrip certificates, but executed no transfer of the shares. The purchaser gave notice to the company of the sale, and paid some calls on the shares. The company afterwards made other calls, and demanded payment from the Plaintiff, and ultimately brought an action against him for them. The Plaintiff filed his bill to restrain the action :—

Held (reversing the decision of *Stuart*, V.C.), that the shares did not pass by the delivery of the scrip certificates, and that the Plaintiff was not discharged from his liability as a shareholder.

By the private Act of a joint stock company, it was provided that it should not be lawful for the company to issue any share, nor should any share vest

(1) 9 Hare, 449.

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in the person accepting the same until one-fifth of the amount of the share had been paid up:

Held, that, notwithstanding this proviso, a shareholder who had not paid one-fifth of the amount of the shares which had been allotted to him, was liable for payment of calls.

East Gloucestershire Railway Company v. *Bartholomew* (1) followed.

13 Eq 624-7-9.
2 L.R. 673.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*. The *West London Wharves and Warehouses Company, Limited*, was constituted originally under the name of the *West London Docks and Warehouses Company, Limited*, and afterwards under its present name, by three special Acts of Parliament, passed in 1863, 1864, and 1865.

The *West London Docks and Warehouses Company's Act*, 1864, contained a proviso, incorporating with it the clauses of the *Companies Clauses Act*, 1845, relating to the distribution, transfer, and forfeiture of shares, by the 14th section of which Act it is provided that the shares shall only be transferred by deed.

The 19th section of the special Act was as follows: "It shall not be lawful for the company to issue any share, nor shall any share vest in the person accepting the same, unless and until a sum not being less than one-fifth part of the amount of such share shall have been paid up in respect thereof."

On the 3rd of February, 1865, a contract was signed between the *International Contract Company* and the *London Wharves Company*, whereby the *International Contract Company* undertook to construct the docks and warehouses required by the *Wharves Company*, and to place the company's capital to a large amount.

On the 20th of February, 1865, the *Wharves Company* issued a prospectus, in which they stated that the capital of the company was £500,000, in £25,000 of £20 each, of which one-third had been already subscribed, and containing a form of application for shares.

On the 24th of February the Plaintiff sent in an application for 100 shares in the usual form, agreeing to accept the same, or a less number, and to be registered as a shareholder. At the same time he paid £1 on each share as a deposit.

In reply to this application, the secretary, on the 8th of March,

(1) Law Rep. 3 Ex. 15.

1865, wrote as follows:—"In reply to your application, the directors have allotted you 100 shares in the company. The amount required on this allotment is £300. You have already paid £100, leaving a balance of £200 to be paid to the *Bank of London* (making £3 per share paid) on or before the 18th instant, or this allotment will be liable to be cancelled, and the deposit forfeited. Due notice will be given when the certificates of shares will be ready for issue."

The Plaintiff accordingly paid the remaining £200.

On the 11th of April, 1865, the secretary sent to the Plaintiff scrip certificates to the amount of his shares, each of which was in the following form :—

"*West London Docks and Warehouses Company, Limited.*

"Ten Scrip Shares of £20 each.

"This is to certify that the allottee has paid £30, and that he or the bearer is entitled to exchange the scrip for corresponding share certificates in the above undertaking, subject to the provisions of the special Acts of Parliament relating to the company. Dated the 20th of March, 1865.

"*** Due notice will be given as soon as the share certificates are ready for delivery."

Previously to the time of his receiving the scrip certificates, the Plaintiff had sold his interest in the shares on the *Stock Exchange* for the 5th of May, and the shares were on that day bought by the *International Contract Company, Limited*, for £493, and the scrip certificates were delivered to them on the completion of the bargain; but no transfer of the shares was ever executed.

The *International Company* gave notice of the purchase to the *West London Wharves Company*.

On the 27th of June, 1865, a call of £2 per share was made, which was paid by the *International Company*. The secretary stated that the notice with respect to the 100 shares was sent to Plaintiff, but he denied that he had received the same.

The Plaintiff's name was placed on the register of shareholders before the end of May, 1865, and the register was formally sealed at the first half-yearly meeting after the issue of the shares, on the 29th of August, 1865.

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By the *West London Wharves and Warehouses Company Act*, 1865, which received the royal assent on the 5th of August, 1865, the company were empowered to raise, by the creation and issue of new shares, ordinary or preferential, or both, and in addition to their capital of £100,000 under the Act of 1863, and also in addition to their capital of £400,000 under the Act of 1864, any sum not exceeding £300,000.

On the 10th of August, 1866, and the 10th of October, 1866, two further calls of £2 10*s.* each per share were made, notices of which were sent to the Plaintiff, but he refused to pay them. On the 2nd of May, 1867, the directors declared the shares forfeited for non-payment of calls.

In the same month the company was registered under the *Companies Act*, 1862, and on the 13th of June, 1867, resolutions were passed to wind it up voluntarily, and liquidators were appointed.

The liquidators subsequently brought an action in the Court of Common Pleas against the Plaintiff for the amount of his calls, and the Plaintiff filed the present bill to restrain them from proceeding with the action.

The Vice-Chancellor granted the relief prayed; and from this decision the Defendants appealed (1).

(1) 1871. Jan. 30. WN(1871)36.

Sir John Stuart, V.C.:—

I have no doubt upon this case. I do not think it necessary to enter into that part of the Plaintiff's case which goes into the question of misrepresentation and fraud on the part of the *Wharves Company*. It is enough, I think, to treat the case upon the clearly established facts, which satisfy me that, when the Plaintiff's name was put upon the register of shareholders, it was put there with a full knowledge on the part of the company that he had sold and transferred his shares, and after they had dealt with and received money from the persons to whom he had so transferred them. That being so, it seems to me that there is no authority, notwithstanding the extraordinary decisions which have been made upon the construction of this Act, that binds me, contrary to the established principles of this Court, to hold that the Plaintiff was properly put upon the register, or that he is properly made a Defendant to an action at law at the suit of the liquidators of the company. [After shortly alluding to the facts of the case, His Honour contined:—] It is quite true, as said by Mr. *Dickinson*, that the certificates of shares are the only evidence of the ownership of the shares; but the scrip certificate is evidence that the company conferred upon the Plaintiff a right to sell and transfer his shares. The Plaintiff, before he had received the scrip certificates, which were in a sense his title-deeds and his authority to trasnfer to a bearer, had by agreement, in the usual course of the *Stock Exchange*, agreed to sell these shares which

The Plaintiff rested his case in great measure on alleged misrepresentations in the prospectus, but as the Court considered that these misrepresentations were not established, the arguments on that subject are not reported.

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Horton Smith*, for the Appellants:—

If the Plaintiff is right in his view of the result of the transaction, he has a good defence at law to the action of the liquidators, and he has no ground for relief in equity. But we contend that he is liable to these calls, both legally and equitably. His contract to take shares was complete when he had paid the allotment money, and he then became a shareholder. His registration dates from the time when his name was put on the register, in May, 1865, not from the time when the register was sealed in August. The clause in the company's Act providing that the shares shall not "vest" till one-fifth of the amount had been paid up, only restrained him from transferring the shares, but did not prevent him from being a perfect shareholder: *East Gloucestershire Rail-*

had been allotted to him. It is in evidence that he had sold them to the *International Contract Company*, but the *International Contract Company* was a company in close relation with the *Wharves Company*, and a company of whom it may be said that the *Wharves Company* was in a great manner a mere creature. The *International Company* became, by a transaction unimpeachable, the purchasers of these shares and paid for them, and according to the terms of the contract the Plaintiff gave his title-deeds—that is, his scrip certificates, transferable to bearer—to the broker of the purchasers. This transaction was all completed in the month of May, 1865. Accordingly, in the month of June, 1865, which was, as I consider on the evidence, before the Plaintiff's name was registered, notices of calls on these very shares were duly transmitted to the *International Company*, and on the 27th of July, 1865, that company paid to the *Wharves Company* the call upon the shares. And it is after that transaction, and (as I must take it) with full knowledge of it, that the secretary takes upon himself to put the Plaintiff's name on the register, and the directors, according to the usual course, solemnly seal that as a proper registration. Any more improper transaction than this can hardly be imagined The consequence is, that the *Wharves Company* having so dealt with the *International Company*, to whom the Plaintiff had transferred his shares by means which were perfectly justifiable, must be restrained from now suing the Plaintiff by their liquidators, and there will be a decree for a perpetual injunction against the liquidators with costs.

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way Company v. *Bartholomew* (1); *Purdey's Case* (2). The company had no power to release him from his liability, even though they had professed to do so. If the scrip certificates were intended to pass the shares to the bearer, they were *ultrà vires*, and directly contrary to the Act, which provides that shares should only be transferred by deed; but they were not issued with that object; they only amounted to an undertaking to accept the holder of the certificate as a shareholder when the shares were legally transferred to him, which was never done in the present case: *Midland Great Western Railway Company* v. *Gordon* (3).

Mr. *Hardy*, Q.C., and Mr. *Whitehorne*, for the Plaintiff:—

The scrip certificates constituted a contract between the company and the shareholder that they would acknowledge the holder of the certificates as their shareholder. They were issued with the express intention of making the right to the shares transferable by delivery; because at that time the Act of 1865 had not passed, and they had no power to issue their full amount of shares. The Plaintiff never became a complete shareholder. One-fifth of his shares were not paid up, and until that had been done the shares did not vest in him. The decision in *East Gloucestershire Railway Company* v. *Bartholomew* is not binding on this Court. The secretary had no right to register his name, for at the very time when that was done he had sold the scrip certificates to the *International Contract Company*. The relations between the two companies were very close, and the directors of one company knew everything which was done in the other. The Defendants treated the *International Company* all along as the owners of the shares, and received payment of calls from them, and they are estopped now from denying that the shares had been transferred.

[They cited and commented on the following cases: *London Grand Junction Railway Company* v. *Freeman* (4); *Waterford and Dublin Railway Company* v. *Pidcock* (5); *Eustace* v. *Dublin Trunk Connecting Railway Company* (6); *In re Bahia and San Francisco Railway Company* (7); *De Pass's Case* (8).]

(1) Law Rep. 3 Ex. 15.
(2) 16 W. R. 660.
(3) 16 M. & W. 804.
(4) 2 Man. & G. 606.
(5) 8 Ex. 279.
(6) Law Rep. 6 Eq. 182.
(7) Ibid. 3 Q. B. 584.
(8) 4 De G. & J. 544.

Sir W. M. James, L.J. :—

It appears to me that there is no substance in any of the points that have been argued before us except the last, namely, that which is based upon the alleged fraud and misrepresentation of the prospectus, which point requires examination. The case is a very simple one. A company, duly incorporated, according to the universal course of business, issues a prospectus containing a form of application for shares, which form contains an undertaking on the part of the applicant to take the shares allotted, and also to be registered in respect of them. The Plaintiff does send in a letter exactly in accordance with that form, and undertakes to take the shares if allotted, and to be registered. An answer is sent to him simply allotting to him those shares, and telling him that he is to pay a certain sum of money, and that if he does not do it before a certain time, then the allotment will be liable to be cancelled and the deposit forfeited. He does pay the money, and therefore the allotment was no longer liable to be cancelled nor the deposit forfeited. Therefore it appears to me he has done everything, and the company has done everything, which was necessary to make him a complete shareholder; subject only, of course, to the question which was decided at law in *East Gloucestershire Railway Company* v. *Bartholomew* (1), and afterwards by the Master of the Rolls in *Purdey's Case* (2), as to the effect of such a provision as the 19th section of this company's private Act, restraining the company from issuing shares at all unless one-fifth of the amount of the shares is first paid. Probably the question may have been, and may still be, an arguable question at law, but we conceive ourselves for all purposes entirely bound by the decision which has been come to by the Court of Law upon that subject. Unless in this action, or in some other action, the Court of Exchequer Chamber, or some tribunal still higher, shall set that aside, I do not think it is for us to have the question reopened, arising as it does upon the mere construction of an Act of Parliament, which affects the world at large.

The result, therefore, is, that the moment those letters were exchanged and the money paid, Mr. *McEuen* became a shareholder, and he became liable, as a shareholder, to the call in respect of

(1) Law Rep. 3 Ex. 15. (2) 16 W. R. 660.

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which he is now being sued. But it is said that this liability has been affected by what has taken place between him and the company; that is to say, that the company, after this contract was complete, released him from his liability as a shareholder, simply by giving him a certificate, which, it was argued, was intended to enable him to go into the market and sell it; and that this constituted a contract between the company and Mr. *McEuen* that he or the bearer of the certificate should be treated as a member. It appears to me that, in that view of the transaction, it was clearly *ultrà vires*. But what the company really meant was this: "We will bind ourselves that if you get a person to take the scrip certificate, we will accept him as a shareholder. You may sell it in the market, and if the man to whom you sell comes to us, we will accept him instead of you." Until that is done there is no removal of the original allottee from the list of members, and nothing to affect his original liability resulting from the contract which he entered into with the company. It appears to me, therefore, that his liability remains exactly as it was on the day on which those letters were exchanged between him and the secretary of the company.

That being so, of course it is still open to this gentleman to say: "I had a right on that day, or as soon after that day as I discovered the fact, to be released from the contract, notwithstanding there was a legal liability, in consequence of misrepresentation in the prospectus." [His Lordship then considered the alleged misrepresentations, and expressed his opinion that none of them were of such a nature as to entitle the Plaintiff to relief, especially after the length of time which had occurred since he knew that his name had been placed on the list of shareholders. His Lordship concluded as follows:—] I am of opinion, therefore, that the Plaintiff was wrong, and that the bill ought to be dismissed.

Sir G. Mellish, L.J.:—

I am of the same opinion. Assuming, as I think we are bound to assume, that the decision of the Court of Exchequer in the case of *East Gloucestershire Railway Company* v. *Bartholomew* (1)

(1) Law Rep. 3 Ex. 15.

was correct, it appears to me directly to follow that the moment the company accepted the offer of the Plaintiff to take 100 shares, and allotted to him 100 shares in the company, and he paid £300 in pursuance of that allotment, he became to all intents and purposes a shareholder in the company, just in the same manner as anybody in any modern railway company would become a shareholder in the company on accepting shares allotted to him and paying the allotment money. The only difference was, that he was restrained from dealing with his shares until he had paid up one-fifth of each share. He then having become a complete shareholder, the directors issued to him the scrip certificates, which no doubt were issued for the purpose of enabling him to sell his shares in the market, but it is perfectly obvious that as the Act of Parliament admits of a transfer and of a legal sale in no way but by a transfer by deed, he could not legally sell the shares simply by selling the scrip: but he could only at most make a contract for sale, which this Court would compel the purchaser to specifically perform. If the one-fifth of the shares was never paid, the time never arrived when he could have compelled the *International Contract Company* to become the legal shareholders; but if the one-fifth was paid, then he could have compelled the *International Contract Company* to come in and complete their contract, and accept a legal transfer and be registered; but until that was done, it appears to me that he continued the legal shareholder, and liable to pay the calls.

Then the only real question is this: If a shareholder in a company, whose shares by Act of Parliament can only be transferred by deed and by an alteration in the register, thinks fit to sell them in another way, which can only make an equitable contract at most, and the company so far act upon it that they receive payments from the person who has entered into that equitable contract, and perhaps issue documents treating him as their shareholder, and calling him their shareholder, does that have the effect of making him the real shareholder? Now it is obvious that, if we were to hold that it had that effect, the consequence would be that the provisions of the Act of Parliament that shares should only be transferred by deed would be entirely eluded; and any person who examined the register, whether a creditor who wished to know

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who the shareholders were in the company, or a shareholder who wished to know who his co-shareholders were, would be entirely deceived. None of the numerous cases cited appear to me to establish the proposition that, when a person has once become a legal shareholder, he can be freed from his liability to pay the calls, simply by shewing that he has made a contract which is void at law, but possibly may amount to an assignment in equity, and that the company to a certain extent has adopted that contract.

There remains the case which has been set up, and which, no doubt, required some consideration, namely, that the shares were applied for in consequence of misrepresentation. I do not wish to give any opinion upon what I think is a question which, when it properly arises, may deserve a great deal of argument, whether, under circumstances like this, the doctrine of *Oakes* v. *Turquand* (1) would not apply—whether a shareholder, who has never repudiated before the winding-up, can after the winding-up restrain the liquidator from bringing an action for calls against him. I wish to give no opinion upon that point, because I am of opinion that none of the alleged misrepresentations have been made out. On the whole, therefore, I am of opinion that there was no ground for filing this bill; and it must now be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Lewis, Munns, & Longden.*
Solicitors for the Company: Messrs. *Tilleard, Godden, & Holme.*

(1) Law Rep. 2 H. L. 325.

TYLER *v.* YATES.

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June 21, 26.

Unconscionable Bargain—Money-lender—Reversion—Usury—Security—Infant —Advantage taken of Youth and Inexperience.

The protection which the Court of Chancery throws round unwary young men in the hands of unscrupulous persons is not affected by the repeal of the usury laws, or by the change of the law as to the sale of reversions.

One brother, who was under age, accepted a bill, which was discounted by a money-lender, and the proceeds were paid to another person. He afterwards applied to the money-lender for further advances, on acceptances by an elder brother, who was then in his twenty-sixth year: the money-lender required the sum due on the former bill to be included in the bill to be accepted by the elder brother. This was agreed to, and bills were accepted by the elder brother for an amount including the sum due on the first bill, and interest, a further sum advanced, and a considerable sum for discount. Further sums were afterwards advanced by the money-lender on similar securities, at considerable discounts, part of the proceeds being received by the elder brother, part by the younger brother; and the elder brother gave charges for all the sums due on the bills upon a reversion to which he was entitled on the death of his mother:—

Held, that the charges so given must stand as security for the sums actually advanced only, with interest at 5 per cent.

Decree of *Stuart*, V.C., affirmed.

THIS was an appeal from a decree of the Vice-Chancellor *Stuart*, declaring that a certain mortgage should stand only as a security for the sums actually advanced by the mortgagee, and interest.

The Defendant *Dicker* and the Defendant *Yates* were both money-lenders. In July, 1864, Lord *Albert Clinton*, who was then about nineteen years of age, was introduced by a Mr. *Wilbraham* to *Dicker*, and *Dicker* was requested by them to discount a bill of exchange for £600 at three months, drawn by *Wilbraham* and accepted by Lord *Albert*. *Yates* discounted the bill for *Dicker*, giving him £520, out of which *Dicker* gave *Wilbraham* £480, the difference being retained by *Dicker* for discount.

In February, 1866, Lord *Albert* applied to *Dicker* to discount other bills, saying that he would ask his brother, Lord *Arthur Clinton*, who was born in 1840 and was in Parliament, to join in the security. *Dicker* represented that he applied to *Yates*, who said he would discount the bills, but would require the former bill

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for £600 to be taken up. This was agreed to, and two bills at three months were drawn by Lord *Albert*, accepted by Lord *Arthur*, and discounted by *Yates*, one for £1500, out of which Lord *Albert* received £574, which, with £600 for the first bill, £100 interest thereon, and £226 discount, commission, and stamp, made up the £1500; the other, for £500, on which Lord *Albert* received £400, the remaining £100 being retained for discount. On the 15th of March, 1866, Lord *Albert* applied to *Dicker* to discount a bill for £500, drawn by Lord *Albert* and accepted by Lord *Arthur*, which *Dicker* did, paying Lord *Albert* £350, and retaining £150 for discount. On the 28th of April *Yates*, at the request of *Dicker*, discounted a bill for £500, of which Lord *Albert* received £400; and on the same 28th of April, Lord *Arthur*, in order to give security for the payment of the bill of £500 of the 15th of March, gave *Dicker* a charge on a reversionary interest in one-fourth of £30,000 expectant on the decease of the Countess of *Lincoln*, to which Lord *Arthur* was entitled under his father's marriage settlement.

On the 7th of May Lord *Arthur* applied to *Dicker* for money, and *Dicker* advanced him £200, receiving a bill for £250 at three months. In June, *Dicker* lent Lord *Arthur* £10. On the 10th of August the bill of the 7th of May was renewed by *Dicker* in exchange for a £300 bill; and on the 6th of September, Lord *Arthur* gave *Dicker* a charge on the reversion for the £300.

None of the bills were met, and other bills were given to *Yates* in place of those for £1500 and £500. *Yates* also made further advances through *Dicker*, and obtained charges on Lord *Arthur's* reversionary interest to secure the whole. *Yates* brought an action against Lord *Arthur* on the bills, and obtained judgment for £3800. Altogether, *Yates* claimed £3800, and *Dicker* held one bill for £500 and one for £300, all charged on the reversionary interest of Lord *Arthur*.

On the 12th of December, 1868, Lord *Arthur* was adjudicated a bankrupt on his own Petition, and *Tyler*, the Plaintiff in this suit, was appointed assignee.

On the 3rd of April, 1869, the Plaintiff filed the bill in this suit against *Yates* and *Dicker*, making charges of fraud and collusion against the Defendants, and praying that the mortgages might

stand as security for the sums advanced only, with interest at £4 per cent., and praying consequent relief.

The charges of fraud were abandoned at the hearing; and those being abandoned, there was very little dispute as to the facts as they appeared on the answers of *Dicker* and of *Yates*. Before the hearing, *Dicker* offered to take £550, the sum actually advanced by him, with interest at 5 per cent. *Yates* also offered to take the amounts actually advanced by him, with interest at 4 or 5 per cent., but these offers were refused.

The Vice-Chancellor *Stuart* considered it useless to direct an account against *Yates*, as all the advances had been made through *Dicker*, but made a decree that the several charges should stand as a security in the hands of *Dicker* for all moneys actually advanced to or for the use of Lord *Arthur* and Lord *Albert*, or either of them, with interest at £5 per cent., as reported (1), where the facts are more fully stated.

Dicker and *Yates* each appealed.

Mr. *Dickinson*, Q.C., and Mr. *F. T. White*, for *Dicker*:—

The charges of fraud have been abandoned, and there was no pressure by *Dicker*, and no application by him. Lord *Arthur Clinton* was twenty-six years old, and in Parliament, and went to *Dicker* asking him to lend money at a given rate. If he had gone to an extravagant tailor or horse-dealer, and had agreed to pay too much for his clothes or his horses, he would have been bound; and where is the difference now that all bargains are open at law? The most eminent bankers charge large interest; and looking at the year when these transactions took place, it is very doubtful whether this money could have been anywhere raised on better terms. The £250, at all events, was simply lent to Lord *Arthur* at his own request, and has nothing to do with Lord *Albert*. These bills are good at law: *Lane* v. *Horlock* (2). No oppression or unfairness has been shewn; and since the change in the law as to the sale of reversions, the owner of the reversion can have no relief unless fraud or oppression is shewn: *Potter* v. *Edwards* (3). We have offered to take the money advanced, and interest; and, at all

(1) Law Rep. 11 Eq. 265. (2) 5 H. L. C. 580.
(3) 26 L. J. (Ch.) 468.

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events, the Plaintiff ought to pay the costs since that offer. He ought, in fact, to pay all the costs, as he asks only to be relieved from his own acts.

Mr. *Greene*, Q.C., and Mr. *C. Browne*, for *Yates*:—

The onus of proof is now changed by 31 Vict. c. 4, and to set aside dealings with a reversion, fraud or oppression must be proved. The Plaintiff has attempted to do so, and has failed. This is a mere ordinary transaction between Lord *Arthur*, *Dicker*, and *Yates*, and *Yates* is an innocent holder. The decree of the Vice-Chancellor does not give *Yates* the money he actually paid to *Dicker*. There was no fraud, no concealment; the amounts paid and retained were clearly stated in every case. To give this relief would set up the usury laws again: *Flight* v. *Reed* (1). We could have exacted payment on the bills, and we must have a right to take security instead of exacting payment. Then, what rate of interest is to be charged? Why, £5 per cent.? It is clear that no one would have advanced money at £5 per cent. on this reversion, only to be paid when the reversion fell in, not to mention all the risks attending such a transaction. At the very time, money was lent on the best security at £10 per cent.; and were we to be kept out of our money for an indefinite time, and only to have £5 per cent.? Is the Court in these cases to refer it to Chambers to consider what is to be paid? It is clear that the parties must be left to their own bargain. Moreover, the Plaintiff merely represents creditors; and why is the Court to give relief to one set of creditors at the expense of another?

Mr. *Karslake*, Q.C., and Mr. *E. C. Willis*, for the Plaintiff, were not called upon.

Lord Hatherley, L.C.:—

The Appellants have urged upon me that the Court must obey the law which has repealed the former laws with respect to usury, and I have been also told that the Court is bound by the law which enacts that the sale of a reversionary interest is not to be set aside on the ground of under value merely. I am one of those

(1) 9 Jur. (N.S.) 1016.

who believe that these changes in the law are very wise in many respects; but, whatever be my own opinion, my duty is to administer the law as I find it.

The Legislature, however, has not repealed, and I believe it will not repeal, the doctrines of this Court, by which protection is thrown round unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities.

This case has, in reality, nothing to do with the amount of interest charged, though it is difficult in these cases to avoid entering into the question of consideration. That question is, however, of the very smallest importance, if the Court can be persuaded that these young men have been fairly dealt with.

I conceive the reason why the law as to sales of reversions was altered to be that the doctrines of this Court had been carried to an extravagant length on that subject. The protection of the Court with regard to the sale of reversionary interests was chiefly given to expectant heirs of real property, and was gradually extended to persons who had reversionary interests of any kind. This case, however, depends simply on the facts:—[His Lordship then stated the facts as they appeared on the answers and evidence as amounting to this: Lord *Albert*, a young man of nineteen, came to *Dicker* in 1864, introduced by *Wilbraham*, a much older man, and *Dicker* went to *Yates*, both *Dicker* and *Yates* knowing that Lord *Albert* was a minor; and his Lordship concluded from *Dicker's* answer, though that of *Yates* was rather different, that they knew that *Wilbraham* was to have the sole benefit of the transaction.] I do not say that the amount of interest or discount taken on that transaction was, under the circumstances, unreasonable; but a man who allows a minor to put his name to a bill has no right to insist on payment, unless the young man, when of full age and under no pressure, legal or honourable, accepts the liability. I use the expression "honourable," because no one can say that a young man who does not get one sixpence out of such a transaction is honourably bound in any way. He was brought as a victim, in order that they (the Defendants) might obtain a lever by which to act upon him thereafter. [His Lordship then stated the evidence as to the bills for £1500 and £500, and said that Lord *Arthur* had nothing to do with the

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£600 bill; but when the further advances were required, they were refused unless the £600 bill was included. It appeared, however, that Lord *Albert* was never told, and Lord *Arthur* was never told that Lord *Albert* was under no legal liability for the £600. However, Lord *Arthur* gave the bill for £1500, which must be taken as part of the same transaction, and it was impossible that this radical defect should not be held to extend to the whole of the proceedings.] They were not told that there was no legal liability for that £600 bill, and the Defendants, on dealing with these two young men, the eldest only twenty-five years of age, and acting through the medium of the younger brother, obtained this bill for £1500, part of which was to go in payment of a debt to which neither was liable.

All the subsequent transactions were affected by the vice which lay at the root and by the pressure thus put upon Lord *Arthur*. He thought that all the money had been advanced for the benefit of his brother, which was not the case; and this affects all the subsequent transactions, for Lord *Arthur* was always under the impression that he was liable for the £1500 bill. And are we to be told that the law of this Court on such matters is overruled by the abolition of the usury laws, and that transactions like this, in which nearly half the nominal advance is deducted, can be allowed to stand?

I am quite aware that these bills were given before the security was given, and it is probable that, at the time when these first transactions took place, the lenders did not know that these young men had this reversion, or else, no doubt, it would have been made use of, though *Dicker* found it out soon afterwards, and took security accordingly.

It is not unworthy of notice that this security was an interest to which Lord *Arthur* was absolutely entitled on the death of his mother, and this shews the necessity of the Court extending its protection to persons in such a position, as he could easily have obtained money upon this security on much better terms. Lord *Arthur* was urged to undertake the payment of money which his brother did not owe, and he did not even know that he had security to offer on which they could have obtained the money at a moderate rate. This demonstrates their utter helplessness, and their absolute

ignorance of the mode in which they might have dealt. But I rest the case upon the fact that one brother is made to become liable for a debt which the other brother did not owe, and I hold that these securities can stand only for the sums actually advanced, and interest, wholly irrespective of the principles of this Court as to the amount of interest to be paid by men in the full possession of their faculties, or as to the value of a reversionary interest. [His Lordship then commented on the form of the bill, which placed the Plaintiff's case too high, and continued:—] I think, however, that relief can be given, because the substance of the case is, that there was a bill accepted for a greater sum of money than was advanced to anybody concerned in it.

As regards the costs, the Plaintiff is not coming merely to be relieved from the consequences of the acts of Lord *Arthur*, whom he represents, but because advantage has been taken of youth and inexperience. On the other hand, the Plaintiff has placed his case too high, and has made charges of fraud which could not be sustained. The Vice-Chancellor has given no costs, and I am not prepared to say that he was wrong. This appeal must be dismissed with costs.

Solicitors: Mr. *W. H. Roberts;* Mr. *M. Turner;* Messrs. *Dalston & Son.*

TOUCHE *v.* METROPOLITAN RAILWAY WAREHOUSING COMPANY.

Agreement with Promoters—Adoption of Agreement by Company—Commencement of Business—Right of Cestui que Trust to sue.

The Plaintiffs had incurred labour and expense in organizing a scheme for certain Exhibition Rooms, and had entered into negotiations with, and sent the plans to, some of the promoters of a certain Company, and offered to accept £2000 for remuneration. The Company was formed, and by the Articles of Agreement it was recited that the Plaintiffs had incurred labour and expense in organizing the Exhibition Rooms, and that it had been arranged with one of the promoters that he should pay them £2000 when and so soon as the Company should be in a position to commence business. And it was agreed that no expense should be incurred until 10,000 shares had been subscribed, and at least £2 a share paid thereon, and that if the Company was

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not in a position to carry on the undertaking before a certain day, then neither the promoters nor the officers of the Company should have any claim upon the funds of the Company. And it was provided that when the shares were subscribed for and paid upon to the amount aforesaid, the directors should pay the above-mentioned promoter the sum of £2000. Copies of the Articles of Association were sent to the Plaintiffs. The shares in the Company were subscribed for and the deposits were paid, but the Company was unable to obtain a site, and never actually commenced business:—

Held, on the evidence, that the Company had adopted the agreement as to the payment of £2000 to the Plaintiffs through the promoter:

Held, that the performance of the agreement was not contingent on the actual commencement of business by the Company:

Held, that the Plaintiffs could maintain a suit against the Company and the Directors, amongst whom was the promoter to whom the £2000 was to be paid, and were not obliged to sue in the name of the promoter.

Decree of *Stuart*, V.C., affirmed.

N. TOUCHE and *F. Delman*, the Plaintiffs in this case, were the projectors and original promoters of a scheme for General Exhibition Rooms, to be incorporated with an undertaking called the *Metropolitan Railway Warehousing Company*, and the Plaintiffs incurred considerable expense in organising this scheme. The Plaintiffs alleged that it was arranged by them with the promoters of the Company through *Walker*, one of the promoters, that the Plaintiffs should receive out of the subscribed capital and funds of the Company the sum of £2000 in consideration of the labour and expense so incurred. The Plaintiffs also corresponded with Mr. *Burchell*, who was a promoter of and the solicitor to the Company, and had sent him plans; and on the 2nd of August, 1865, they sent him a letter, in which they said that they would be satisfied with £2000 for their remuneration as promoters.

The Company was duly registered on the 25th of August, 1865, and the Articles of Association provided, amongst other things, as follows:—

"Whereas labour and expense have been incurred by certain persons in and about the organization and formation of the *Metropolitan Railway Warehousing Company, Limited*, and by certain other persons in and about the formation and organization of the General Exhibition Rooms to be incorporated with the undertaking of the Company; and it hath been arranged by and with *Geo. H. Walker*, Esq., that he shall pay to such first-mentioned persons, for the labour and expense incurred by them up to the day of the

date of these Articles (except the cost of their preparation and registration), the sum of £3000; and to such secondly-mentioned persons the sum of £2000, when and so soon as this Company shall be in a position to commence business, and funds shall be available for such purposes, as provided by Art. 2 of these presents, but not sooner or otherwise. And whereas it hath been further arranged by and with the said *G. H. Walker* and the several other persons, officers of the Company, each in his respective department, as mentioned in the minutes of the promoters of the Company, that they shall perform all necessary duties and pay all proper charges incident thereto, to be repaid and remunerated from the time their duties commenced out of the funds of the Company when and so soon as the Company shall be in a position to commence business, and the same funds shall be available for such purpose, as provided in the said Art. 2, and not sooner or otherwise. And whereas it hath been further arranged by and with the consent of all the aforesaid persons and officers, that if the Company shall not be in a position to carry on its undertaking prior to the 31st day of March, 1866, as provided in said Art. 2, then all deposits or moneys which may have been received from the subscribers to the Memorandum of Association of the Company, or from any other subscribers thereto, or shareholders in the Company, shall be repaid and returned to such subscribers and shareholders respectively, without any deduction; and neither the said *G. H. Walker*, nor either of the other persons, nor either of the said officers, shall have any claim or demand upon the funds of the Company, or upon the Company, or upon all or any of the Directors or subscribers to the said Memorandum or Articles or shareholders of the said Company.

"Art. 2. No expense shall be incurred by or on behalf of the Company, nor shall the funds of the Company be available for the payment of any goods supplied, expenses incurred, or services rendered, until 10,000 shares shall have been accepted, and at least £2 upon each share shall have been paid up; and if such number of shares be not so accepted and paid upon on or before the 31st day of March, 1866, all deposits or sums received from the respective subscribers to the said Memorandum of Association and to these Articles, and upon shares accepted in the said Company,

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shall be returned and repaid without deduction; but the Directors shall be at liberty to make such contracts and engagements as they may deem necessary, conditional upon the acceptance of, and payment upon, such shares.

"Art. 66. The Directors shall, so soon as 10,000 shares shall have been subscribed for and paid upon, according to Art. 2, pay to the said *G. H. Walker* the sums of £3000 and £2000, and to him and the other officers of the Company the several amounts due to them, in accordance with the arrangements mentioned in the recital to these Articles."

Copies of the Articles were sent by Mr. *Burchell* to the Plaintiffs; and it was admitted that the Plaintiffs were the secondly-mentioned persons who had incurred labour and expense.

The full number of 10,000 shares in the Company was subscribed for, and at least £2 per share paid thereon, before the appointed day; and the Directors had a considerable sum in their hands.

The Plaintiffs, on the 9th of December, 1865, applied for the £2000, and they continued to make applications to the Directors of the Company; and on the 4th of June, 1866, they filed their bill in this suit against the *Metropolitan Railway Warehousing Company* and the eight directors, stating that *Walker* alleged that he was not personally liable, and had no funds of the Company under his control, and that he refused to compel the other Directors to concur with him in providing the necessary funds; and praying that the Defendants might, out of the assets of the Company, pay the £2000 and interest.

The Company, by their answer, denied that there was any agreement between them and the Plaintiffs, but admitted that there was an understanding between the Plaintiffs and *Walker*, who was afterwards the Managing Director, and the other promoters of the Company, that in the event of the Company being in a position to commence business, and adopting the General Exhibition Rooms, then £2000 should be paid to the Plaintiffs by the Directors of the Company through *Walker*.

They further said that they had never been in a position to commence business, as they had not even obtained a site for the erection of the necessary buildings. They also said that they did not contemplate the establishment of General Exhibition Rooms.

The other Defendants answered to the same effect. Both sides entered into evidence, the effect of which is stated by the Lord Chancellor in his judgment. It did not appear for whom the £3000 was intended, and it was stated that the Company had, since the institution of the suit, been wound up, and that *Walker* had claimed £5000 in the winding-up.

The Vice-Chancellor *Stuart* made a decree for payment to the Plaintiffs, and the Company appealed.

Mr. *Karslake*, Q.C., and Mr. *Fellows*, for the Company:—

We say, first, that we were never able to get the site which we wanted for our warehouses, and we were therefore never able to commence business; so that nothing became payable to the Plaintiffs, even if there had been such an agreement as they allege, and all the money must be repaid to the subscribers. But we deny that there was any agreement between the Plaintiffs and the Company. There may have been an agreement between the Plaintiffs and the promoters, which the Plaintiffs may enforce if they can; but the Company is a new creature, with no liabilities, except such as it may choose to adopt. The recitals in the articles are mere statements of facts, but there is no trust or case of agency alleged in the bill, or attempted to be made out as against the Company: *Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2).

The money was never paid to *Walker*, and he was never constituted a trustee. Moreover, the Plaintiffs have no right to sue the Company, even on their own shewing; their remedy, if any, is against *Walker*, as their trustee, and he must enforce their rights if he can.

Mr. *O'Malley*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiffs.

LORD HATHERLEY, L.C., after reading the statements in the bill as to the arrangements between the Plaintiffs and *Walker* and *Burchell*, continued:—

That was before the formation of the Company, and no doubt any agreement entered into before the Company was formed would

(1) Law Rep. 2 C. P. 174. (2) Law Rep. 2 C. P. 255.

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not be binding on the Company unless the Company chose in some way to adopt or ratify it.

I think that I am not bound to assess the value of the services of the Plaintiffs. The services of a promoter are very peculiar; great skill, energy, and ingenuity may be employed in constructing a plan and in bringing it out to the best advantage. It was argued that the Plaintiffs had done nothing at all for the Company in particular, and that the Plaintiffs might have sold their scheme to another Company, and that, therefore, there was no connection between the Plaintiffs and the Company. But that is not so. When this scheme had been once used by the Company it would be far less available to the Plaintiffs.

It appears to me that *bonâ fide* labour was bestowed by the Plaintiffs in getting up this novel combination of exhibition and shop. Plans were drawn and designs were made, and submitted to Mr. *Burchell*, which are now in the possession of the Company. A correspondence went on from September, 1864, to July, 1865; the Plaintiffs were satisfied with what had been done, and considered that they would be connected with the new Company. On the 2nd of August, a few weeks before the formation of the Company, an arrangement was made as to the £2000; and the Plaintiffs, by the advice of *Walker*, sent a letter to Mr. *Burchell*, who was a promoter of the Company and the solicitor of the Company, that they would be well satisfied with £2000.

Then the Company was formed. Of course it would not have been bound by anything which preceded it; but *Walker* seems to have taken care to have stipulations inserted in the deed that those who had incurred the labour and expense should be paid for their services. [His Lordship then read the provisions of the deed.]

It is very questionable whether an action could have been brought by the Plaintiffs against *Walker*, as he had been very careful to provide that the Company should furnish this money. [His Lordship then commented on the evidence.] I will assume that everything happened to make the money payable as between the Company and *Walker;* and then I think it is established that there was an engagement on the part of the Company communicated to the Plaintiffs that the Company, which had had the bene-

fit of the services of the Plaintiffs, had agreed to hand over the £2000 to *Walker* as trustee for them; and if the money was paid to *Walker*, they would be entitled to have it paid to them. *Walker* says that he was never asked to sue; but the Company has, since the institution of this suit, been wound up, and *Walker* has, as I understand, claimed £5000. If he had taken no steps to enforce the claim, the Plaintiffs would be entitled to say that he must, on being properly indemnified, take such steps as might be advised for their relief, and perhaps that would have been the more correct course for them. But I think I am justified in holding that the Plaintiffs have a right to come here and obtain the benefit of the arrangement entered into between *Walker* and the Company. *Davenport* v. *Bishopp* (1) and *Gregory* v. *Williams* (2) are authorities to that effect.

As to whether the time has come when the money is to be paid, it has been argued that the Company has never been in a position to commence business within the meaning of Arts. 1 and 2. But the deposit-money has been paid, and I must hold that the Company was in a position to commence business. Otherwise there might be the preposterous result that a Company might enter into large contracts for land and building, and have work done, and then be able to say that they had never been in a position to commence business, and would therefore repay the shareholders, leaving nothing for the creditors, merely because the shop had not been actually opened. The true meaning of the articles must be, that the Company would not be bound by any contracts until the money was in hand, but their liability was by no means dependent on their getting the land. It has been argued that they were never able to buy the land, and that no time was fixed; but it would be absurd to say that the officers of the Company were not to be paid because the Company had not begun their business, and the creditors are in the same position. The thing is made still more clear by Art. 66, if there had been any doubt about it.

The case comes within the authority that where a sum is payable by *A. B.* for the benefit of *C. D.*, *C. D.* can claim under the contract as if it had been made with himself. It is possible that *Walker* may, as he states in his answer, not be under any personal

(1) 2 Y. & C. Ch. 451; 1 Ph. 698. (2) 3 Mer. 582.

L. C. 1871 TOUCHE v. METROPOLITAN RAILWAY WAREHOUSING COMPANY.

liability to the Plaintiffs; but I think that, on the evidence, the Plaintiffs were to be paid when *Walker* got the money, and they knew that by the Articles of the Company he was to be paid.

This appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Hughes, Masterman, & Hughes.*

Solicitors for the Defendants: Messrs. *Burchell.*

L. C. 1871 *July* 11.

ROLLAND *v.* HART.

Registration—Middlesex Registry Act—Priority—Notice to Solicitor—Communication to Client—Fraud.

A solicitor induced a client to advance money for *A.*, on mortgage of lands in *Middlesex*, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered:—

Held (reversing the decision of the Master of the Rolls), that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority.

Kennedy v. *Green* (1) distinguished.

7 Ch 166
8 Ch 395
10 Eq 353
20 Eq 247
9 Ch D. 195 n.
10 Ch D. 702
15 Ch D 639
641–4
21 Ch D 484

By an indenture bearing date the 11th day of May, 1861, one *James Hall*, a builder, assigned to *Henry George Robinson* divers freeholds and leaseholds in the county of *Middlesex*, upon certain trusts therein mentioned, and with power to mortgage the same.

By an indenture bearing date the 10th day of May, 1862, it was witnessed that *Robinson*, by the direction of *Hall*, assigned to *Amelia Marianne Leigh*, spinster, all the hereditaments comprised in the above-recited indenture, by way of security for £4000 paid by Miss *Leigh* to *Robinson*, with the assent of *Hall*; and *Hall* covenanted for the repayment of the £4000 and interest.

By an indenture bearing date the 9th day of July, 1862, it was witnessed that, in consideration of the sum of £4000 paid by *George Stagg* to *Robinson*, at the request and by the direction of *Hall*,

(1) 3 My. & K. 699.

Hall covenanted for the repayment of the said sum and interest; and it was further witnessed that *Robinson* did assign unto *Stagg* all the hereditaments comprised in the first-mentioned indenture by way of security for the said sum of £4000 and interest.

Robinson was a solicitor, and both Miss *Leigh* and Mr. *Stagg* were clients of his, and were induced by him to advance these sums of £4000. Neither of the mortgage deeds was registered by *Robinson*. *Stagg* stated that he was informed by *Robinson* that the money was wanted by *Hall* for the purchase of part of the property mortgaged; that he (*Stagg*) did not understand legal documents, and relied upon the representations and integrity of *Robinson*; that he (*Stagg*), at the time when he advanced the £4000, and for some time after *Robinson* left *England*, had no notice or knowledge of the securities of Miss *Leigh*.

Robinson left *England* under difficulties in December, 1863, and *Stagg* then employed another solicitor—Mr. *Pearpoint*—who followed *Robinson*, obtained from him the deed of the 9th of July, 1862, and registered it on the 4th of January, 1864. Miss *Leigh's* mortgage deed was registered by *Robinson's* partner on the 23rd of January, 1864.

This suit was instituted by a prior mortgagee of part of the property comprised in these securities; and this part having been sold in the suit, and having produced more than sufficient to pay the prior mortgagee, the question arose as to the priority of Miss *Leigh* or Mr. *Stagg*.

The Chief Clerk of the Master of the Rolls found that Miss *Leigh's* mortgage had priority; but on a summons to vary that certificate, the Master of the Rolls made an order giving Mr. *Stagg* the priority (1).

Miss *Leigh* appealed.

(1) 1871. March 9. LORD ROMILLY, M.R., said he thought that *Le Neve* v. *Le Neve* (Amb. 436) did not apply in this case, and that it was necessary that there should be notice to the prior mortgagee, the neglect of which on his part would amount to fraud. If *Le Neve* v. *Le Neve* now came before the Court for the first time, the same decision would be arrived at, for there it was probable that the intended wife knew perfectly well what was going on. In all these cases there was great difficulty as to the notice; but there must be something culpable either on the part of the principal or of his solicitor to deprive the holder of the registered security of his priority. No doubt

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ROLLAND v. HART.

Mr. *Joshua Williams*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Burgett*, for Miss *Leigh*:—

This case is governed by *Le Neve* v. *Le Neve* (1). In *Benham* v. *Keane* (2) there could have been no actual fraud. *Hine* v. *Dodd* (3) was a question of evidence, and so was *Jolland* v. *Stainbridge* (4). Notice to the solicitor is notice to the client for the purposes of priority of registration: *Tunstall* v. *Trappes* (5).

[They also referred to *Bushell* v. *Bushell* (6) and *Kennedy* v. *Green* (7).]

If *Stagg* had employed another solicitor, who had had notice from *Robinson* of Miss *Leigh's* mortgage, there could have been no doubt about it; and where is the difference?

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for *Stagg*:—

Notice to the agent is not always notice to the principal: *Dart's* Vendors and Purchasers (8). *Jolland* v. *Stainbridge* and *Wyatt* v. *Barwell* (9) shew that nothing short of actual fraud can destroy the effect of registration. *Chadwick* v. *Turner* (10), *Sheldon* v. *Cox* (11), and *Nixon* v. *Hamilton* (12), only follow *Le Neve* v. *Le Neve* (13). *Hewitt* v. *Loosemoore* (14) shews that a mortgagee has not notice of everything of which the mortgagor has notice. The question of fraud is one of fact. The new solicitor employed by Mr. *Stagg* was rather more active than Miss *Leigh's* solicitor; but where is the fraud? *Espin*

Le Neve v. *Le Neve* would govern this case if *Stagg* had employed a separate solicitor who had had notice of the prior incumbrance; but here it was certain that *Robinson* never told *Stagg* of Miss *Leigh's* securities, for if he had, *Stagg* would not have advanced the money. In fact *Kennedy* v. *Green* (3 My. & K. 699) did apply to this case, because, as *Robinson* was the person who committed the fraud, it was highly improbable that he communicated anything to *Stagg*. It must be proved either that the principal had notice of the prior security, or that it was highly probable that the solicitor did communicate the fact, otherwise the slightest thing would prevent any one from taking advantage of registration, and the Registration Acts might as well be repealed.

(1) Amb. 436; 2 Tu. L. C. 28, 3rd Ed.
(2) 1 J. & H. 685; 3 D. F. & J. 318.
(3) 2 Atk. 275.
(4) 3 Ves. 478.
(5) 3 Sim. 301.
(6) 1 Sch. & Lef. 90.
(7) 3 My. & K. 699.
(8) 4th Ed. p. 783.
(9) 19 Ves. 435.
(10) Law Rep. 1 Ch. 310.
(11) Amb. 624.
(12) 2 Dr. & Wal. 364.
(13) Amb. 436; 2 Tu. L. C. 28, 3rd Ed.
(14) 9 Hare, 449.

v. *Pemberton* (1) shews that facts which a solicitor will not communicate will not be imputed as known to the client. So in *Atterbury* v. *Wallis* (2). Here it is clear that in fact *Robinson* concealed the prior mortgage, and intended to leave all these securities unregistered. We have registered ours, and ought to have the advantage. A statutory title like this cannot be taken away without proof of notice amounting to fraud: *Chadwick* v. *Turner* (3).

LORD HATHERLEY, L.C.:—

I am bound to say that I cannot agree with the view which the Master of the Rolls has taken in this case.

It is a hard case undoubtedly, but is it competent for me upon that ground to disturb what seems to be concluded and settled by decision?

The only point which has to be inquired into in cases of this kind is, whether the second mortgagee had what, in the eye of a Court of Equity, would amount to notice of Miss *Leigh's* incumbrance at the time when he advanced his money.

It is not, perhaps, very easy to see the exact shades of distinction between the cases; but this appears to be decided from the time of *Hine* v. *Dodd* (4) downwards, that a mere suspicion of fraud is not enough, and there must be actual notice implying fraud in the person registering the second incumbrance to deprive him of priority thereby gained over the first incumbrance. In all those cases down to *Wyatt* v. *Barwell* (5) the expression is, that there must be actual notice amounting to fraud. It is very well put in Mr. *Dart's* book (6), that it must be actual notice, which renders it fraudulent to attempt to obtain priority, or to advance money when knowing that another person has already advanced money upon the same security, and afterwards unrighteously to attempt to deprive him of the benefit of that security by taking advantage of the *Registration Act.*

Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transac-

(1) 4 Drew. 333; 3 De G. & J. 547.
(2) 8 D. M. & G. 454.
(3) Law Rep. 1 Ch. 310.
(4) 2 Atk. 275.
(5) 19 Ves. 435.
(6) 4th Ed. p. 873.

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tion, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain.

I think it is clear, upon the authorities, that as there was, in this case, plain and distinct notice on the part of the solicitor employed by Mr. *Stagg* of the previous security, that notice must, therefore, be imputed to Mr. *Stagg*.

[His Lordship then stated the circumstances of this case.]

In that state of facts the question cannot arise whether the knowledge acquired by the solicitor *Robinson* in the first transaction can be imputed to him in the second transaction. There have been cases of some delicacy and difficulty as to the distance of time at which it might be presumed that a solicitor, having obtained information, might or might not be in such a situation as to be held to carry the information which he possessed over to his client; but nothing of that kind arises here. It is therefore impossible to say that Mr. *Stagg* must not have had the knowledge which *Robinson* had unless the case can be brought within the principle of *Kennedy* v. *Green* (1). I think, with Lord Justice *Turner*, that the question how far you are justified in assuming that the agent does not communicate to his client information which he has received, and ought to have communicated, may be affected by very delicate shades of difference. It might be said that the very fact of the solicitor not having communicated an important circumstance is of itself evidence of fraud. But Lord Justice *Turner*, in the case of *Atterbury* v. *Wallis* (2), exactly meets that difficulty, and says that such a rule cannot prevail. It

(1) 3 My. & K. 699. (2) 8 D. M. & G. 454.

must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him. In *Kennedy* v. *Green* (1) the facts were not communicated.

Upon this branch of the case I was anxious to ascertain whether there was any evidence that *Robinson* was at this time in a position in which he could be fixed with any such fraud. But I cannot find evidence of anything of the kind at that time. He was not raising any money for himself, but for *Hall;* and though he grievously neglected his duty, he does not appear to have been concerned in any fraud which would render concealment necessary, so as to bring the case within *Kennedy* v. *Green.* The circumstance that six months after he had improperly borrowed money for *Hall* he fell into difficulties and left the country, cannot affect the state of things at the time of these transactions.

It seems to me that the refined distinction drawn by the Master of the Rolls with reference to *Le Neve* v. *Le Neve* (2) cannot be supported. [His Lordship then commented on that case.] Lord *Hardwicke,* in that case, says that the object of the registry was to prevent people from being imposed upon, but that those who had notice, and had the option of not lending their money, were in no danger of being imposed upon.

There is no difference in the *Registration Act* on this point of notice, and I must take it as if the solicitor had told *Stagg* that he was going to lend his money on property upon which Miss *Leigh* had a previous mortgage. If *Stagg* had then registered his mortgage in order to acquire priority over Miss *Leigh,* that would have been a fraud. And it does not appear to me that this case can be brought within the principle of *Kennedy* v. *Green.*

A distinction, however, was drawn by Mr. *Southgate,* who said that, after all, *Robinson,* who was aware of all these facts, was not the person who registered the deed, as in the case of *Le Neve* v. *Le Neve.* But this amounts to nothing. I have already gone through my reasons for holding that *Stagg* must be taken to have known the facts; and how can it be said that a person who knows the facts is placed in any better position because he goes to another solicitor who is not informed of the facts and knows nothing about them?

(1) 3 My. & K. 699. (2) Amb. 436.

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The case of *Sheldon* v. *Cox* (1), which was relied upon, only follows *Le Neve* v. *Le Neve* (2), and I do not think that what was decided in *Hine* v. *Dodd* (3), or in *Jolland* v. *Stainbridge* (4), or in *Wyatt* v. *Barwell* (5), amounts to more than holding that actual notice must be shewn, which amounts to fraud in the person who, having such actual notice, attempts through the medium of the *Registration Act* to get priority. That is also laid down very clearly in *Bushell* v. *Bushell* (6), which is very often referred to in these cases.

Whether it be prudent or imprudent that the law should continue in that state is not a matter which I have to discuss on the present occasion. Some think that the law should be rendered like that relating to ship registry, but ship registers are of a very different character, and how far one rule or the other is right is not a matter which it is easy for anybody to determine. What has hitherto repressed those who have been anxious to do away with this doctrine of notice is, that there would always remain a very strong feeling on the part of mankind against a person who, knowing distinctly that his neighbour had lent a large sum of money, took a security subject to that, and then obtained priority by a previous registration, doing that which, as I held in *Benham* v. *Keane* (7), this Court will not allow to be done. This Court will not allow a man who has already pledged his estate to pledge it a second time, and will not allow any person to assist him in so doing by lending a second sum of money in this way.

The authorities have been uniform in holding that the proof of notice must be very clear and distinct; but if actual notice is proved, then a man cannot take advantage of his registration to invalidate a previous unregistered security.

In this case there seems to me to have been actual notice; and I am compelled, therefore, to come to a contrary conclusion from that of the Master of the Rolls. The certificate will therefore stand, with the consequent directions.

Solicitor for Mr. *Stagg*: Mr. *Pearpoint*.
Solicitors for Miss *Leigh*: Messrs. *Webster & Graham*.

(1) Amb. 624.
(2) Ibid. 436.
(3) 2 Atk. 275.
(4) 3 Ves. 478.
(5) 19 Ibid. 435.
(6) 1 Sch. & Lef. 90.
(7) 1 J. & H. 685; 7 Jur. (N.S.) 1096.

PEMBERTON *v.* BARNES.

L. C.
1871
July 14.

Partition Suit—Sale—Partition Act, 1868.

An estate, comprising a first-class mansion, with a park of nearly 300 acres, above 3000 acres of agricultural land, and a manor, the rights of which extended over about thirty square miles, belonged to the Plaintiffs and Defendants in moieties. The Plaintiffs filed a bill for a partition, and asked for a sale, adducing evidence, which was not contradicted, to shew that, in the circumstances of the case, the property would in all probability fetch a much higher price, if sold as a whole, than the allotted parts would sell for after a partition. The Defendants strongly objected to a sale:—

Held, by *Malins*, V.C., that, under sect. 4 of the *Partition Act*, 1868, the Court had a discretion, and that a sale would not be ordered against the wish of the owners of a moiety where there were no circumstances rendering a partition specially inconvenient:

Held, on appeal, that a sale must be ordered, for that sect. 4 is imperative, and obliges the Court to order a sale where the owners of a moiety ask for it, unless the objecting parties will purchase, under sect. 5, the shares of the parties asking a sale, or the Court sees some good reason why a sale should not be ordered.

THIS was an appeal by the Plaintiffs in a partition suit from a decision of Vice-Chancellor *Malins*, who had refused to direct a sale, and had ordered a partition.

The *Tring Park* estate, which formed the bulk of the property in question, had formerly belonged to the Crown, and the mansion had once been occupied by King *Charles* I. The estate had been purchased, in 1820, by *William Kay* the father, who died in 1838, having devised it to his son *William Kay* for life, with remainders in tail to the children of *William Kay* the son, with remainder to the use of his nephew and niece, *Robert Nixon* and the Defendant *Ann Barnes*, the wife of Dr. *Thomas Barnes*, as tenants in common in fee. After the death of the testator, the *Tring Town Farm* and some other adjoining lands were purchased with moneys arising under the will, and were held upon trusts corresponding with the uses limited of the *Tring Park* estate. *Nixon* having died, his reversion in fee in a moiety of the *Tring Park* estate, and of the purchased lands, was sold in 1854 for payment of his debts, and purchased by *W. Kay* the son. *William Kay* the son, by will, dated the 5th of March, 1863, devised his moiety to the use

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of the Plaintiffs in fee upon trust for sale, with powers to concur in a partition, and died in 1865 without issue. Dr. and Mrs. *Barnes* had previously settled their moiety in strict settlement, but reserving to themselves a power of revocation.

The *Tring Park* estate consisted of the manor of *Great Tring*, the manorial rights of which extended over about thirty square miles; the *Tring* mansion-house, with the gardens, pleasure-grounds, and park, containing 290 acres; other lands in hand containing above 300 acres; and fifteen farms, and other houses and lands, the whole containing 3348 acres, of which some small portions were copyhold.

The subsequently purchased estates contained about 295 acres, partly freehold and partly copyhold.

The Plaintiffs filed their bill against Dr. and Mrs. *Barnes* and the trustees in whom the purchased lands were vested, stating that the *Tring Park* estate and purchased lands constituted an estate of great value, from their position, from the character of the property, and from the fact that the mansion-house was of great antiquity and historical interest, and that for these reasons the estate would fetch a much larger price if sold as a whole than if sold in moieties; and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between them. The bill according prayed for a sale, or if the Court did not think fit to direct a sale, then for a partition. Dr. and Mrs. *Barnes*, by answer, stated that the estate could be easily and conveniently partitioned; that each moiety would form an estate of great value; that to the best of their judgment and belief a sale of the entirety would not be more beneficial to the parties interested than a partition; and that as their own moiety had been settled, a sale would be most prejudicial to them and their family; and they objected to a sale, and submitted that no sufficient ground was shewn for it.

Two eminent land-agents, who gave evidence on the part of the Plaintiffs, deposed that the *Tring Park* estate was a valuable and compact property, peculiarly well adapted for a nobleman's establishment, or for that of a gentleman of large fortune; and if sold as a whole would realise a much larger price than it possibly could if sold in moieties. They went on to say that it would not, in

their opinion, be possible to make a satisfactory partition, because the mansion and park, with the manorial rights, possessed an extra value which it would be difficult or impossible to ascertain except by public competition; that if any large proportion of the lands near the park were severed from it this extra value would be much diminished; and that for these reasons they were of opinion that the full market value of the estate could not be obtained without putting it up for sale by auction in one lot, or putting up in one lot the mansion and park, and all the principal part of the lands lying in a ring-fence immediately surrounding the same. They further stated their decided opinion that, if the estate were put up in one lot, a fancy price would be obtained, as there were many persons desirous of acquiring large residential estates near *London*.

Dr. and Mrs. *Barnes* and their son, by affidavit in answer, objected to the estate being sold in order that the Plaintiffs might obtain a fancy price, and denied that the sale would be more beneficial to the parties than a partition. Mrs. *Barnes* stated that she wished her moiety kept in the family in remembrance of her uncle *William Kay* the elder, and for the benefit of her family.

Dr. and Mrs. *Barnes* lived at *Carlisle*, and had never resided at or near the property. Mrs. *Barnes* had since died.

Vice-Chancellor *Malins* held that the Plaintiffs were not entitled to a sale against the wish of the Defendants, and directed a partition (1).

(1) 1871. April 24. SIR R. MALINS, V.C.:—

This case raises a very important question under the Act. The suit is for a partition of the *Tring Park* estate, containing 3600 acres, of which about 300 acres form a deer-park, in which there is a mansion-house, and, as it appears, such an one that any nobleman or gentleman of large landed estate might well be satisfied to reside in it. Taking away the mansion-house and deer-park, the estate consists of about 3300 acres. The question is, whether, upon the application of the owners of one moiety of this estate against the wishes of the owners of the other moiety, the Court is bound under the Act to direct the land to be converted into money.

Now, if this Act of 1868 had not been passed, it is clear that the Court could have done nothing more than direct a partition, the effect of which would be necessarily to allot the mansion-house and deer-park to the owners of one moiety, with such a proportion of the land as would make up an equivalent to the value of what would be left for those who did not take the mansion-house and deer-park. Now has this Act of Parliament thrown upon the Court the obligation in such cases against the wish of the owners of

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PEMBERTON v. BARNES.

Mr. *Glasse*, Q.C. (Mr. *Fry*, Q.C., and Mr. *James Kaye*, with him), in support of the appeal, referred to *Lys* v. *Lys* (1), and was then stopped by the Court.

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one moiety of the estate to convert the landed estate into money? I am of opinion that the Act of Parliament never contemplated any such result. It was introduced, as is well known, to obviate the great inconveniences which arose from the difficulty of effecting a partition of small properties in which a great number of persons were interested, and in which, in many instances, it was exceedingly difficult to know how to get at the means of paying the expenses of the partition. It is well known that it had become a common practice of the Courts to declare the costs of the suit a charge on the estate, and for the purpose of raising those costs to direct a sale. Now, in obviating the necessity of a recourse to such devices as that, this Act of Parliament has a most beneficial operation. But is it, upon its fair construction, applicable to every case in which two persons are entitled to an estate in moieties, whatever the magnitude of the estate may be. If so, this Act, which, in my opinion, was intended to have a limited operation only, may have the effect of turning a very considerable part of the landed property of the country into money against the wish of the owners of a moiety of it.

Now, in the present case, the parties claim under the will of Mr. *William Kay*, who purchased the *Tring Park* estate in 1820. What price he gave for it does not appear, nor is it important. In 1834, he having an only son, made a will, by which he devised the property to his only son for life, with remainder to his first and other sons, remainder to his daughters; and in the event of his dying without issue (which has happened), then it was to go to the use of *Robert Nixon*, who is a nephew, and *Anne Barnes*, who is a niece, as tenants in common in fee. The Plaintiffs claim under *Robert Nixon*, the Defendants claim under *Anne Barnes*. Both, therefore, are entitled under the will of *William Kay*. Now, *William Kay* has given this property to his nephew and niece as real estate; the Plaintiffs have the moiety which was limited in fee to *Robert Nixon*. The Defendants have the other moiety, which was limited in fee to *Anne Barnes*. From the testator they take a title to it as land, and unless there be some very strong reason shewn for doing so, what right has this Court, in the case of a large estate like this, merely because one of the parties thinks it would be more convenient to sell—what right, I say, has the Court to oblige the other co-owner to submit to the conversion into money of an estate for which they may have the greatest possible affection? In this case the application for the sale is rested solely on the ground that this estate, consisting of mansion-house, deer-park, and 3300 acres of land, besides manorial rights, thirty-one miles from *London*, will be so attractive as to attract persons of large capital desirous of investing in land, and desirous of acquiring that consequence which arises from the ownership of land, and from possessing a residence like this, to become the owners. That may be true or

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(1) Law Rep. 7 Eq. 126.

Mr. *Cotton*, Q.C., and Mr. *Speed*, for Dr. *Barnes*:—

The object of the *Partition Act* was to provide for cases in which there was some difficulty in the way of a partition. In *Lys*

may be untrue, and it is a mere matter of speculation, upon which, if I were to take the opinion of half a dozen of the most experienced land-valuers in *England*, probably I should have several different opinions as to whether this estate would be more likely to fetch more money by being sold as one entire estate, or whether, being divided, it should be sold in two parts, one with the mansion-house and deer-park, and with about 1300 or 1400 acres of land, and the other as land. I feel very considerable doubt upon it myself, as a man of the world, and I am satisfied it would not be an unanimous opinion. I see, on the one hand, there are great capitalists who would desire to have the whole land, and who never think they have got land enough, and who would like to have the right of sporting over the whole of this land, and who derive great enjoyment from the possession of large territory and the consequence which it gives. On the other hand, there are parties desiring land, and who consider they are amply provided with land if they get a mansion-house and park and 1200 or 1300 acres of land; and it may be that, owing to the greater number of purchasers who would bid for the smaller quantity, quite as high a price would obtain upon a sale in lots as would be derived from the attraction I have referred to of the ownership of a large quantity of land. This is a matter of pure speculation. We have had the opinion of highly respectable and experienced land-valuers, Messrs. *Chinnock & Galsworthy*, who have given their opinion with reference to this matter. I have only their opinion upon the subject; but I am quite satisfied that it is their true opinion, and it may be that it is correct. I rather think it is an opinion from which the Defendants themselves are not much inclined to differ, because Dr. *Barnes* says that the object is to get a greater price for the estate, which seems rather to concede that the effect would be to produce a greater price. Upon the whole, if I were obliged to form a conclusion on the subject, I think the probabilities are, that by selling it as an entire estate it would fetch a higher price than by dividing it and selling it as two estates; but, I repeat, it is only a pure matter of speculation.

Now the question wholly depends on the 3rd and 4th sections of this Act of Parliament. The 3rd section is one which was fairly treated by the counsel for the Plaintiffs, as one merely giving a power to the Court to direct a sale. It only authorizes the Court to sell. The 4th is relied upon as being imperative, unless a good reason can be shewn to the contrary.

Now, with regard to the general purpose and object of this Act, I think it is fairly to be collected from the words of the 3rd section; and I think that it will be found that it is, as I have said, to enable the Court to get over the difficulties of effecting a partition of property where there really is a difficulty arising from the nature of the property itself or from the rights of the parties:—[His Honour here read the 3rd section.] It undoubtedly has been the practice of the Court to exercise that discretion in all cases where it sees from the surrounding circumstances that a sale is expedient.

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v. *Lys* (1) the property was small, and had a house upon it; it also appeared from the record that it was divisible among four parties, that one share was subject to several mortgages, and another was

Now the 4th section is what is here relied upon:—[His Honour read the section.] Mr. *Glasse* says it is imperative, and no doubt it would have been but for the words "the Court shall, *unless it sees good reason to the contrary*, direct a sale." This leaves it entirely to the discretion of the Court; and the Court, in exercising that discretion, must have regard to all the surrounding circumstances; but above all, it must look, I apprehend, to the nature of the property and the interests of the parties. Now, when I am told by one of the parties that, having derived from the common benefactor, the testator, a right to a share of the land as land, he desires to retain it as land, is not that a very good reason why I should not prevent that party having the great advantages and enjoyments which everybody knows are derived from the ownership of land? Why is it asked that it should be converted into money? In order merely that the owners of the other moiety may get a larger price. But it is not the object of the Act, so far as I can see, that in all cases the owners of one moiety of an estate, because they think that by selling it altogether they could get more money for it than by selling it in parts, may force on the owners of the other moiety the obligation to submit to have their property converted into money. It therefore appears to me that, whenever the Court sees that there is not a sufficient reason for selling, it ought not to direct a sale; and I do not think that the mere circumstance that more money can be obtained by selling both shares together is a sufficient reason. Before this Act there was no other right than to a partition, and I do not think it was the object of this Act to throw on the owners of a moiety of an estate, however large it may be, and however great the advantages derived from the possession of the land may be, the obligation of having it converted into money because the owner of the other moiety thinks it would be for his benefit.

I am not by any means satisfied that in this case it would not be more wise for the Defendants to submit to a sale than to have a partition, for this is an estate from which they do not appear to have had any personal enjoyment. They have resided at a great distance from it. The estate is distant only thirty miles to the north of *London*, while these parties have resided 200 miles or more to the north of *London*. Personal enjoyment, therefore, of the estate up to this time they do not seem to have had; but they have a continuing right to have it whenever they think fit. Mrs. *Barnes* was an aged lady, no doubt, because in her evidence she speaks of having gone with her uncle to see this place fifty years ago. She is recently dead. Dr. *Barnes*, I take it, must be a man far advanced in life, and he cannot therefore expect to derive much personal enjoyment from the estate. But it is said that Mr. *Barnes*, the son, a gentleman of forty-two years of age, desires, if that property should be his, to go to *Tring* and the neighbourhood,

(1) Law Rep. 7 Eq. 126.

settled. The operation of the Act should be construed as confined to cases where there was an evil to be remedied. Here is a very large estate, which would make two handsome properties, and there is no difficulty whatever in the way of partition, for the manor can be partitioned: *Cattley* v. *Arnold* (1); *Hanbury* v. *Hussey* (2). Under the 4th section the Court has a discretion; and this discretion ought not, we submit, to be exercised by forcing the owners of one moiety to take money instead of land. The evidence that the estate would fetch a much higher price if sold together is purely speculative.

Mr. *Pearson*, Q.C., and Mr. *Rowcliffe*, appeared for parties in the same interest as the Plaintiffs, and Mr. *Kekewich* and Mr. *Waller*, for other parties.

LORD HATHERLEY, L.C.:—

It appears to me, I confess, in this case that the Vice-Chancellor has adopted a construction of the Act which entirely destroys the effect of the 4th section. The scheme and intention of the Act are plainly to be seen from the 3rd, 4th, 5th, and 6th sections. There are no recitals and no preamble, and therefore we are left to infer from the sections themselves what were the different evils which were struck at. In the first place it is very inconvenient to have a property held in undivided shares; for that evil the Court has a

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and enjoy the possession of this land. I cannot see that I am bound under this Act to force on him an obligation to have this land converted into money because the owners of the other moiety think they can make more money out of it by selling it in its entirety. I feel compelled, upon what appears to me to be the true interpretation of this Act, to come to the conclusion that in this case, under the 4th section, a good reason has been shewn to the contrary of my directing a sale, and the decree will therefore be for partition.

The authority upon the subject is very scanty. As regards *Lys* v. *Lys* (Law Rep. 7 Eq. 126), I entirely agree with that case, and had it been before me I should not have hesitated to make a similar decree to that which the Vice-Chancellor made, because it was a very small property. I think that the case before Vice-Chancellor *Stuart* (*Dicks* v. *Batten*, June 28, 1870) is in favour of my view, because he refused to make an order for a sale where there was no difficulty in making a partition. It is perfectly clear that there is no difficulty in making a partition here.

(1) 4 K. & J. 595.

(2) 14 Beav. 152.

(a) W.N. (1870) 173.

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remedy in the shape of partition. Then it has been found that upon partition the ordinary remedies of the Court are not sufficient to prevent in some cases injustice being done and great inconvenience being sustained. Therefore this Act was passed to assist the Court in making a just and proper arrangement as between parties interested.

Now what are the inconveniences connected with partition suits? If tenants in common cannot agree among themselves as to partition or sale, any one of them may apply to the Court for a partition. The very circumstance of being obliged to submit to a partition is a great hardship in some cases, but it is a thing which must be submitted to. Then, no doubt—and it was the foundation of the judgment of the Vice-Chancellor—there may be extreme hardship in compelling a man who has a share in land to take money instead of it. But, on the other hand, a partition may expose him to very serious inconvenience. He does not know what the result of the partition may be; whether the lots are of equal value is a matter of valuation—that is, in fact, of opinion; and supposing them to be of equal value, it may be that he gets the very lot which he least wishes to have; and a part owner may very well say, "I would rather have the estate turned into money, and get my share of its real and proper value, than take the chance of having the estate allotted at the discretion of somebody whom I may not like to be my judge, or under the direction of the Court, and of having allotted to me a lot which I think of less value than the others, or which, for other reasons, I do not wish to have." He therefore may wish for a sale. One man may prefer a partition because he wishes to be a landed proprietor; another, who is not so anxious to possess land, may prefer a sale of the entirety, as giving the certainty of a fair and equal division. The Legislature saw that all these questions might arise, and it has provided for them by the 3rd, 4th, 5th, and 6th sections of the Act. In the 3rd section it deals with the case which frequently happens where there is extreme inconvenience in partition. We are all familiar with the absurdities to which the partition of a single house has sometimes given rise, and there were many cases where a partition was inconvenient in the extreme. The Legislature has, in the 3rd section, provided a complete remedy

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for this by empowering the Court, in a case where there would be grievance and hardship in a partition, to sell, on the application of any party, notwithstanding dissent or disability on the part of any or all, it might be, of the other parties. The 4th section seems to me to be perfectly distinct from the 3rd, for whereas the 3rd section in terms applies only where the Court is satisfied that a partition is inconvenient and not beneficial for the parties, there is no such condition inserted in the 4th section; and whereas under the 3rd section a discretionary power was given to the Court to order a sale, if it thought a sale more beneficial than a partition, the 4th section makes it imperative on the Court, in a certain state of circumstances, to order a sale, unless it sees good reason to the contrary; that is to say, the onus is thrown on the person who says that the Court ought not to order a sale, to shew some good reason why it should not do so; otherwise, the Court is bound to order it. The scope of the enactment appears to me to be this: there being, as I have said, reasons which may induce some of the part owners to wish for a partition, and others to wish for a sale and a division of the proceeds, the Legislature says that if the votes are equally divided, one half of the persons interested in the property desiring a sale and the other half a partition, then the half requiring the sale shall have the preponderating voice, and the Court shall be bound to give them a sale wholly irrespective of the 3rd section. But still there is a certain discretion left to the Court, so that the Court can refuse a sale where it is manifestly asked for through vindictive feeling, or is on any other ground unreasonable. If we then look to the 5th section, we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3rd and 4th sections:—[His Lordship read the 5th section.] Here a wide discretion is given to the Court. The Court may think that a sale under the 3rd or 4th section is rather hard upon the parties who are very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the Court can give them liberty to do so. The 6th section gives a further security by providing that on any sale under the Act the parties interested may have liberty to bid.

The case, therefore, stands thus: 1. The Court is at liberty, at

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the request of a person holding one-tenth, and against the wish of the persons holding the other nine-tenths, to order a sale, if from the nature of the property, or from the number of the persons interested, the Court thinks it right and reasonable to do so. 2. If the Court finds that the parties entitled to a moiety or upwards desire a sale, the Court must order it, unless some good reason is shewn to the contrary, or unless the persons objecting to a sale offer to purchase the shares of the parties desiring it, in which case the Court has a discretion to authorize them to do so.

The only question remaining is, What is the meaning of the words "unless the Court sees good reason to the contrary?" The whole judgment of the learned Vice-Chancellor proceeds upon this principle, "I do not think the Legislature could have meant that large estates, where there is no difficulty about partition, should be sold." The answer to that is this: The difficulty of partition is dealt with in sect. 3, and there is not in sect. 4 a single word about the size of the estate or the difficulty of partition; it simply speaks of a case where half the parties interested desire a sale, and it provides that they shall have a preponderating voice. Why they should have it is not for me to say; but the Legislature has thought fit to say so. It would be striking the section out of the Act to say that the owners of the other moiety have no more to do than to come and say, "We do not wish for a sale." The Legislature has said that there shall be a sale if the owner of one moiety asks for it, unless good reason is shewn to the contrary. The Vice-Chancellor has said (for he puts his judgment quite as high as that), "I cannot see why one party should be turned out of his moiety against his wish, simply because the owner of the other moiety says that he desires the estate to be sold." The Vice-Chancellor then urges, as a reason against a sale, that the two part owners come from a common ancestor, and that the testator gave the estate to them as land. No doubt he gave it as land; but he gave it to them absolutely, and there was nothing to prevent them from disposing of it as they thought fit. Consequently, I do not see that its coming from a common ancestor makes any great difference. Neither party has ever lived upon the property. It has been vacant since the death of the tenant for life for about six years, and the parties

who object to a sale have been living 200 or 300 miles off all this time. I cannot see that any reason is given against a sale beyond this, that the owners of one moiety object to it; and I cannot think it a sound construction of the Act to say that this is a sufficient reason. The Defendants are not wholly without remedy; they can obtain leave to bid under the 6th section, or apply under the 5th section to have the share of the Plaintiffs valued; but to direct a partition, and not a sale, in the present case, would be striking the 4th section out of the Act. The Court would not allow a sale where it was asked merely for purposes of vexation; but I see nothing of that kind here. I see no reason to doubt the evidence that the property, if sold entire, is likely to fetch a higher price than the allotments, if sold after a partition, would fetch; and I cannot agree that the partition of an estate of this peculiar kind, including a manor extending over thirty miles, with about 3000 acres of land, a park, and large family mansion, is a plain and straightforward matter. Both sides might wish to have the house, or both sides might wish to have the manor, or one might be very sorry to have one without the other. But I put the case on the higher ground, because I think that the Court, in order to refuse a sale when asked for by the owners of a moiety, must see some real plain good cause, whatever that cause may be, why it should not be ordered. The decree of the Vice-Chancellor must therefore be reversed, and there must be substituted for it a decree for sale, with liberty to the Defendants to bid.

Solicitors: Mr. *J. Sheppard;* Mr. *Joseph Raw;* Messrs. *Wood, Street, & Hayter;* Messrs. *Phillips & Pearce.*

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July 13, 17.

ROBERTSON *v.* FRASER.

Will—Codicil—Construction—Joint Tenants or Tenants in Common—"Participate."

A testator by his will appointed *A.* and *B.* his executors and trustees, and after providing a fund for the payment of his debts and legacies, and all legacy duties, gave his residuary estate to his trustees for their absolute use and benefit. By a codicil he appointed *C.* an additional executor and trustee of his will, and declared that the residuary bequest should be read as if the names of *A.*, *B.*, and *C.* were inserted instead of the names of *A.* and *B.*, "so that *C.* should participate in such bequest free from legacy duty with *A.* and *B.*" *A.* died before the testator:—

Held (affirming the decision of *Stuart*, V.C.), that the effect of the codicil was to make *A.*, *B.*, and *C.* tenants in common of the residue, and that *A.*'s share lapsed to the next of kin.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* on a question arising on the construction of the will and codicil of *Henry Richardson*.

By his will, dated the 20th of June, 1867, the testator appointed *John How Johnson* and *William Joseph Fraser* his executors, and after giving to each of his executors £300, and declaring that all the legacies, shares of property, and bequests given or bequeathed by his will should be paid as soon as conveniently might be after his decease, free from all legacy duties, the testator gave and bequeathed certain houses in *London*, with the household furniture and effects therein, and the rents due at his decease, to the said *J. H. Johnson* and *W. J. Fraser*, upon trust to sell the same, and after payment of his debts, funeral and testamentary expenses, and the legacies and bequests given and bequeathed by his will, and all legacy duties, out of the proceeds of such sale and the receipt of such rents, to invest the proceeds in Three per Cent. Reduced Annuities, and to hold the last-mentioned fund, and also any other sum which might be standing in his name in the same stock, upon the trusts therein declared. And as to all the rest and residue of his estate and effects whatsoever and wheresoever, he gave, devised, and bequeathed the same unto the said *J. H. Johnson* and *W. J. Fraser* for their own absolute use and benefit.

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The testator made a codicil to his will, dated the 2nd of July, 1869, which was in the following terms:

"Whereas by my said within written will I have nominated and appointed *J. H. Johnson*, of &c., and *W. J. Fraser*, of &c., to be the trustees and executors of my said will. Now I hereby nominate and appoint *Joseph Warren*, of &c., to be an additional trustee and executor of my said will; and I declare that my said will shall be read and construed as if the names of the said *J. H. Johnson*, *W. J. Fraser*, and *J. Warren* were inserted therein throughout instead of the names of the said *J. H. Johnson* and *W. J. Fraser*, and that all the trusts and powers in and by my said will reposed in and made exercisable by the said *J. H. Johnson* and *W. J. Fraser*, or the survivor of them, or the heirs, executors, or administrators of such survivor, shall be executed and exercisable by the said *J. H. Johnson*, *W. J. Fraser*, and *J. Warren*, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor. And I give to the said *J. Warren* the sum of £300 sterling, absolutely free from legacy duty, to be paid out of the same fund and in the same manner as the legacies given by my said will are directed to be paid. And I declare that my said will shall be read and construed as if in the bequest of my residuary estate and effects the names of the said *J. H. Johnson*, *W. J. Fraser*, and *J. Warren* were inserted in such bequest instead of the names of the said *J. H. Johnson* and *W. J. Fraser*, so that the said *J. Warren* shall and may participate in such bequest, free from legacy duty, with the said *J. H. Johnson* and *W. J. Fraser*, and in all other respects I confirm my said will."

The testator died in December, 1869. *J. H. Johnson* died in the lifetime of the testator; *W. J. Fraser* and *J. Warren* survived him, and proved the will and codicil.

A bill for the administration of the testator's estate was filed by some of the next of kin against the two surviving executors, in the course of which the question arose, among others, whether the residuary estate was given to the three executors named in the will and codicil as joint tenants or tenants in common; the Plaintiffs maintaining that the effect of the codicil was to give the three executors a tenancy in common, and that the share of *J. H. Johnson* lapsed to the next of kin of the testator. The Vice-Chancellor decided in

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favour of the next of kin, and from this decision the two surviving executors appealed. The Plaintiffs also appealed from other parts of the order, which are not the subjects of the present report.

Mr. *Greene*, Q.C., Mr. *Karslake*, Q.C., Mr. *Forster*, and Mr. *Vaughan Hawkins*, for the Appellants:—

The joint tenancy which was created by the will is not affected by the use of the word "participate" in the codicil. The word is in itself of ambiguous meaning, and does not necessarily imply division, and the testator has carefully framed the codicil to shew that his intention was simply to introduce the name of *J. Warren* without altering the frame of the gift. If *J. Warren* had died before the testator, so that the object of the codicil had failed, would the Court, nevertheless, have held that the tenure of the original legatees had been altered? The object of a testator giving his residue in joint tenancy is to prevent an intestacy; and although it may be true that the Court inclines against a joint tenancy, it is equally true that it inclines against an intestacy.

[They cited the following authorities: *Tuckerman* v. *Jefferies* (1); *Pearce* v. *Edmeades* (2); *Armstrong* v. *Eldridge* (3); *Edwardes* v. *Jones* (4); *Robertson* v. *Powell* (5); and referred to *Johnson's*, *Webster's*, *Richardson's* and *Latham's* Dictionaries, under the word "Participate."]

Mr. *Dickinson*, Q.C., and Mr. *Collins*, for the Plaintiffs; and Mr. *Hardy*, Q.C., Mr. *Pontifex*, and Mr. *Winslow*, for Defendants in the same interest:—

The Court takes hold of very slight indications of an intention that the legatees should take separate shares to imply a tenancy in common. The word "participate" is stronger than other words which have been held to have this effect: and in the present case the last clause in the codicil would be mere surplusage unless it has the effect contended for. The fact of the residue being given free of legacy duty, shews that it was not intended to be a joint tenancy, for the shares would have to be assessed separately.

[They referred to *Ratcliff's Case* (6); *Gant* v. *Lawrence* (7);

(1) 11 Mod. 108.
(2) 3 Y. & C. Ex. 246.
(3) 3 Bro. C. C. 215.
(4) 33 Beav. 348.
(5) 2 H. & C. 762.
(6) 3 Coke, 39 b.
(7) Wigh. 395.

Lewen v. *Cox* (1); *Loveacres* v. *Blight* (2); *Liddard* v. *Liddard* (3); *Jarman* on Wills (4); *Hawkins* on Wills (5).]

Mr. *Greene*, in reply:—

The *Legacy Duty Act*, 36 Geo. 3, c. 52, s. 16, expressly provides for the mode of assessing the duty on the interest of joint tenants, which can be done without severing the joint tenancy.

July 17. LORD HATHERLEY, L.C.:—

The question to be disposed of on this appeal arises out of the gift of the residue in the will, which constitutes the residuary legatees joint tenants, as varied by the gift in the codicil:—[His Lordship then read the clause in the will containing the residuary gift, and also the codicil, and continued:—] It is the last clause in the codicil which alone creates the difficulty; and the question has been argued at considerable length, and many cases have been cited on both sides. I should have felt no difficulty in applying the authorities if this clause had occurred in the original will; the only difficulty arises from the fact of its occurring in the codicil. I cannot doubt, having regard to the authorities respecting the effect of such words as "amongst" and "respectively," that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in common. Perhaps it would have been well if the Courts had held that in bequests, as in partnerships, every community of interest was to be considered a tenancy in common. But that has not been done. However, putting aside such words as "alike" and "equally"—for they may be considered more decidedly inconsistent with joint tenancy, inasmuch as the interests of joint tenants are very rarely quite equal, considering the difference that may exist in the ages of the legatees—it does not appear to me that such words as "amongst" and "respectively" are at all stronger than "participate." I have, therefore, no doubt that the word "participate" is sufficient to indicate an intention to divide, and to create a tenancy in common. My doubt has been as to the

(1) 2 Cro. Eliz. 695.
(2) 1 Cowp. 352.
(3) 28 Beav. 266.
(4) Vol. i. Page 239.
(5) Page 112.

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effect of the peculiar form of the codicil; but my doubt is not sufficient to induce me to reverse the decision of the Vice-Chancellor.

The testator effects his purpose by way of reference to the original gift in the will. In two places he directs that the will is to be read as if the name of *Joseph Warren* had been inserted in the original bequest; that alone would have given a joint tenancy to the three. But then he adds the clause: "So that the said *J. Warren* shall and may participate in such bequest, free of legacy duty, with the said *J. H. Johnson* and *W. J. Fraser*." Some argument has been raised as to the effect of the direction that the bequest is to be free of legacy duty in indicating a tenancy in common; but that argument is sufficiently answered by reference to the *Legacy Duty Act* (36 Geo. 3, c. 52), in which the Legislature has specially provided for the payment of legacy duty by joint tenants, although they stand in different degrees of relationship. No difficulty, therefore, arises upon that point. But when we find the testator not contented with inserting the name of the new legatee, but expressing his reason for so doing, we must take the reason as he gives it, and that reason is, that the new legatee may participate with the two other legatees—in other words, that there may be a sharing of the bequest; and all the authorities go to this, that if there is to be a sharing, the shares must be equal; and division being once imported, the true interpretation must be a tenancy in common. There is a fallacy in the argument when it is contended that the testator shews no intention to alter the will because he does not interfere with the form of the bequest. The testator is not altering the will, he is only explaining it. He uses words which the Court allows to be explained by very slight indications of intention, and having used them, he goes on, not to alter them, but to explain them by words shewing an intention to create a tenancy in common. On the whole, therefore, far from being clear that the Vice-Chancellor was wrong, I am inclined to agree in the conclusion at which he has arrived. The appeal must be dismissed with costs.

Solicitor for the Plaintiffs: Mr. *A. E. Briant.*

Solicitors for the Defendants: Messrs. *Tanqueray-Willaume, Hanbury, & Tanqueray-Willaume;* Messrs. *Lawford & Waterhouse.*

HAMILTON *v.* HECTOR.

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July 17, 18, 19.

Custody of Children—Specific Performance—Lawful Agreement.

A wife intended to proceed in the Divorce Court for a separation, and had filed a bill against her husband to set aside a certain appointment. By a deed of compromise it was agreed that the proceedings should be stayed, that two of the children should remain at such schools as the husband should direct, and that their holidays should be passed at such places as the trustees should direct:—

Held, that, although a father could not by agreement deprive himself of the control of his children, the agreement in this case as to where the holidays of the children should be passed was reasonable, and would be enforced by the Court.

Decision of the Master of the Rolls reversed.

ANNE HECTOR, one of the Plaintiffs in this case, was, in 1858, married to the Defendant *Alexander Hector*, and there was issue of the marriage four children. In October, 1870, *Anne Hector* gave instructions to her solicitors to present a Petition in the Divorce Court for a judicial separation from *Alexander Hector*; and she also filed a bill in Chancery against him, to set aside a certain appointment, as having been obtained from her by undue influence. After some negotiation between the parties, an indenture was executed, dated the 10th of December, 1870, between *Alexander Hector* of the first part, *Anne Hector* of the second part, and *A. Hamilton* and *F. Jones* as trustees of the third part. By this indenture, after reciting as above stated, and that it had been agreed between the husband and wife that it would be desirable for both parties, and for their children, that a separation should take place, rather than that the proceedings in the Court of Chancery and the Divorce Court should be prosecuted: It was witnessed that *Alexander Hector* covenanted that *Anne Hector* might thereafter live separate from him, and that he would not seek to enter her residence, except with the written authority of the trustees, for the purpose of seeing either of the children. The indenture then contained provisions as to the property of the husband and wife, and contained a declaration that the two elder children should, subject to such powers as were conferred upon the

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trustees, remain at such schools in *England* as *Alexander Hector*, or such schools elsewhere as *Alexander Hector*, with the consent of *Anne Hector*, should from time to time direct; and that each of them should from time to time have all reasonable access to and communication with the said children, subject, nevertheless, to the ordinary regulations of the respective schools; and that the holidays of the children should be passed by them at such places and in such manner as the said trustees should from time to time direct, having regard as far as practicable to the wishes of each of them the said *Alexander Hector* and *Anne Hector:* Provided always, that if any disputes should arise between them as to the times and manner in which *Anne Hector* should have communication with the two elder children, then such disputes should be settled by the trustees: And, further, that it should be lawful for the trustees, if any circumstances should arise which in their opinion rendered it absolutely necessary for the welfare and interest of the children that the two elder children should be removed from the custody or control of *Alexander Hector*, or from the school at which they might be, to remove the children accordingly. And it was agreed that the bill in Chancery should be dismissed, and that *Anne Hector* should not institute proceedings for a judicial separation or divorce so long as she lived separate from *Alexander Hector*.

The two elder children were placed in schools chosen by *Alexander Hector*. *Alexander Hector* refused to allow the children to pass any part of the Christmas holidays with *Anne Hector;* and the Easter holidays were passed by the children with *Alexander Hector*. In April, the solicitors of the trustees applied to the solicitors of *Alexander Hector*, asking for a definite arrangement as to the Midsummer holidays. Another letter was sent in May; but no answer was returned to either letter. On the 26th of May the trustees sent notice to *Alexander Hector* that they directed that the first four weeks of the children's holidays should be passed with Mrs. *Hector* and the rest with Mr. *Hector*. On the 13th of June the bill in this suit was filed by *Anne Hector* and the trustees of the deed of separation, and by the four children, against *Alexander Hector*, stating as above, and stating other matters of complaint against him, and that he intended to prevent

the two elder children from passing any part of the Midsummer holidays with *Anne Hector*, and praying (amongst other things) that *Alexander Hector* might be restrained from preventing the two children from passing the first month of the coming Midsummer holidays with *Anne Hector*.

The Plaintiffs moved accordingly. The Master of the Rolls was of opinion that the agreement was against the policy of the law, which had not been altered by the *Divorce Acts* (20 & 21 Vict. c. 85, and 22 & 23 Vict. c. 61), and made no order. The Plaintiffs then appealed.

A great quantity of evidence was produced, and several questions were raised, to which, for the purposes of this report, it is not necessary to refer.

Mr. *Jessel*, Q.C., and Mr. *Lindley*, for the Plaintiffs:—

This is a perfectly legal covenant by the husband. An order to this effect might have been made by the Court, and any end obtainable by suit can be obtained by compromise: *Rowley* v. *Rowley* (1). The Court always had power to take away children from the father: *Vansittart* v. *Vansittart* (2); and now that to the Divorce Court the power is expressly given, there can be no illegality: *Swift* v. *Swift* (3); *Chetwynd* v. *Chetwynd* (4). The Court can take the custody from both parents, and surely the parents may agree to leave it to their friends to decide where the children are to pass their holidays: *Mallinson* v. *Mallinson* (5). Moreover, the law has been altered by *Talfourd's Act* (2 & 3 Vict. c. 54); and there is now nothing illegal in such an agreement as this. Some of the provisions of the deed may be illegal, but the others may be enforced.

Sir *R. Baggallay*, Q.C., and Mr. *A. E. Miller*, for the Defendant:—

There are many things, such as divorce, which the parties cannot effect without the intervention of the Court. At all events, they cannot support such an agreement as this on a mere suggestion of facts, for here no proceedings had actually been taken for a separation. The facts must be proved.

(1) Law Rep. 1 H. L., Sc. 63.
(2) 2 De G. & J. 249.
(3) 11 Jur. (N.S.) 458.
(4) Law Rep. 1 P. & D. 39.
(5) Law Rep. 1 P. & D. 221.

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Mr. *Jessel*, in reply :—

There can be no occasion to force parties into the scandal of a divorce suit, and a compromise can do everything which a decree could do: *Wilson* v. *Wilson* (1). The parties cannot, of course, by agreement, effect a divorce or make a conveyance by a married woman, and the Court could not enforce such an agreement; but whatever the parties can agree to do, the Court can enforce. Is a woman who wants the custody of her children to be driven to injure them by the publicity of a divorce?

The LORD CHANCELLOR expressed his opinion that there had been a *bonâ fide* intention to take proceedings for a separation, and reserved his judgment on the effect of the deed.

July 19. LORD HATHERLEY, L.C., after stating the principal facts of the case, and referring to the clauses in the deed of separation, continued :—

The argument, I think, has been put by Mr. *Jessel* very much too high. His argument is this: that whatever be the provisions of the deed, whether they be or be not for the total translation of those powers and duties which a father, in the eye of the law, possesses in regard to his children to third persons as trustees, those provisions would be enforced; and that the husband and wife having quarrelled, and the whole matter having been the subject of an intended suit against the husband in the Divorce Court, this Court ought to hold her competent to obtain by contract all the relief which she could obtain by prosecuting her suit. With regard to any ordinary matter, no doubt the parties are not obliged to enter into litigation in order to obtain their rights, and every Court would rather encourage than otherwise their settling their differences in an amicable manner, especially in such a case as this.

But, on the other hand, we must remember that the duties of a father to his children stand upon a totally different ground, and a much higher ground, than any contract with respect to pecuniary relations between the parties. The law of *England* regards a

(1) 1 H. L. C. 538; 12 Jur. 467.

father as a person who has duties which he cannot renounce—the duties of caring for, and seeing to the due education of, his children; though he may be deprived of them either by the authority of this Court, if there is gross breach or neglect of parental duty, as appears from the cases of *Swift* v. *Swift* (1) and *Vansittart* v. *Vansittart* (2), or in certain cases under Serjeant *Talfourd's Act*. And latterly the Court of Divorce has been armed with the power of saying, whenever it sees the necessity for a divorce, what is right and proper to be done with the children.

But one cannot help seeing that the Legislature here has intrusted the Courts, and the Courts only, with this power of dealing with children in a manner which will supersede that authority and control which the father in the first instance ought to exercise. And I think that it would be a very dangerous doctrine to hold that this authority could be transferred to third parties, although I am told that in one case, under very particular circumstances, the Court of Divorce has, where the conduct of both husband and wife was very bad, intrusted to third parties those duties which originally belonged to the father.

But I think there is a great deal of difference between that case and the present, which is simply this: The father and mother were about to separate. Under the deed, at least so far as it has been acted upon, the father retains really the sole control, except during holidays. The father is to have the choice of the schools. It might have been arranged that one set of holidays should be passed with the father, and one with the mother, instead of which they agree that the matter shall be left to the decision of two friends. The father retains the control of the children's education, except that during the holidays they are to see their other parent, and the trustees are only to interfere if circumstances should require it; and there is a provision which no Court would think unreasonable, and which is no abnegation of parental power, that if the children go abroad the mother is to concur in that course of action.

The only authority sought to be taken from the father is that of saying where the holidays are to be passed. The trustees are called upon as friends to say what would be reasonable in that respect.

(1) 11 Jur. (N.S.) 458. (2) 2 De G. & J. 249.

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I think that, without holding that everything may be done by contract, which the Court might do, I am justified, having regard to all the authorities, in adopting the suggestion of the trustees, who have said that the first month of the holidays is a reasonable time to be passed with the mother. If the first part of the holidays has already passed, the trustees will probably make a new direction, and the father will be restrained from interfering.

Solicitors for the Plaintiffs: Messrs. *Janson, Cobb, & Pearson.*
Solicitors for the Defendant: Messrs. *Clarkson & Co.*

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L. C. 1871 *July* 17, 20.

Patent—Specification—Largeness of Claim—Issues—Practice.

The usual issues may be granted in a patent suit before the hearing of the cause, although the Defendant denies the validity of the Plaintiff's patent on the ground of the generality of the claim in the specification.

Decision of *Wickens*, V.C., reversed.

Where a patentee, in his specification, professes to do by machinery what has never been done before by machinery, and describes the machinery by which he does it, his claim is not too large on the face of it, because it claims generally to perform the operation "by machinery."

A patentee in his specification described an improved ruffle or frill, and the machinery by which he proposed to make such improved ruffle, and to fasten it to a plain fabric by a single series of stitches. By his claim he claimed "the production by machinery of ruffles, and the simultaneous attachment of them to a plain fabric by a single series of stitches":—

Held, that the claim was not, on the face of it, too large.

THIS was an appeal from an order of Vice-Chancellor *Wickens*.(1)

The Plaintiffs were the assignees of a patent taken out by *J. H. Johnson*, for "an improved ruffle and sewing-machine for producing the same, applicable also to ordinary stitching."

The letters patent bore date the 5th of March, 1860. The material parts of the specification were as follows:—

"The said invention relates to an improved ruffle, frill, or gathered fabric, and to the machinery for making the same: which ruffle, frill, or gathered fabric differs from all others hitherto made, inasmuch as a single series of stitches firmly holds the gathers together, and attaches them to an ungathered fabric, such as a

(1) See W.N. (1871) 120.

dress or a strip of cloth, instead of requiring a second series of stitches to attach them to the ungathered fabric. At the same time, the ruffle made according to this invention is more regular and uniform in its appearance. According to this invention, it is prepared to place two pieces of fabric upon or against each other, and to pass them through the combined machinery. One of these pieces is thereby gathered, and immediately thereupon sewed to or upon the other piece."

"The apparatus used in producing this ruffle or gathered fabric consists of a peculiar mechanism for gathering and feeding, or moving forward one of the fabrics operated upon, which peculiar mechanism is used in combination with a sewing-machine, the latter being modified to receive the additional mechanism. The feeding mechanism of the combined machinery is composed of two distinct parts; one of these parts, which may be termed the "gatherer," performs the operation of gathering the two pieces of cloth, and at the same time moves it round to the place where it is brought into contact with the other piece of cloth."

The specification then contained a detailed description of the machine and the method of using it, illustrated by drawings, in the course of which description was the following statement:—

"In making a ruffle, or gathering, according to the methods hitherto practised, great irregularity of the plaits or gathers was unavoidable, from the fact that the gathering thread could not, with any ordinary amount of care, be made to act equally upon all parts of the fabric. To obviate this difficulty in part, it is customary to 'whip' or 'scratch' the plaits or gathers with a sharp instrument, so as to form a fold at or near the proper point. This process is tedious, and tends to injure the fabric. In this invention no such operation is necessary."

The specification then proceeded:—

"The mechanism above described is also applicable to the making of gathered work of all kinds, which is not attached at the time of making thereof to another piece of fabric, but is simply gathered on itself, the plaits or folds being firmly secured by means of a single series of stitches. In this case, the single piece of fabric to be gathered is placed on the two feeding surfaces, and between the 'separater' as well as the 'presser' foot. Motion

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being communicated to the combined mechanism in the ordinary way, the fabric will be thereupon gathered on itself and securely stitched, so that the plaits or folds will not slip along the thread, but be tightly held together."

"I do not confine myself to the use of one stitch to each fold or plait, as more or fewer may be used in cases without affecting the character of the invention; neither do I confine myself to the precise combination of machinery herein described, since modifications may be made therein with a similar result.

"Having now described and particularly ascertained the nature of the said invention, and the manner in which the same is or may be used or carried into effect, I would observe in conclusion that what I consider to be novel and original, and therefore claim as the invention secured to me by the hereinbefore in part recited letters patent, is:—

"1. The production by machinery of ruffles, frills, and gathered work, and the simultaneous attachment of the same to a plain fabric by means of a single series of stitches, which serve both to confine and stitch the gathers, and also to secure one fabric to the other.

"2. The production by machinery at one operation of gathered work, which is simply gathered and secured on itself by stitches.

"3. The combination of mechanism for forming ruffles, plaits, and gathers, with the mechanism of a sewing-machine, for the purpose of simultaneously gathering fabrics, and attaching the same by stitches to another fabric, or for the purpose of making gathered work, which is simply gathered and secured on itself at one operation.

"4. The general construction, arrangement, and combination of mechanism for producing gathered work in sewing-machines, as hereinbefore described.

"5. The application and use to and in sewing-machines of two feeding surfaces, one thereof for producing gathers, and the other for moving onward the fabric as fast as it is stitched.

"6. The system or mode of regulating the fulness of the gathers in gathered work produced by machinery, by varying the relative throw of the feeding and gathering surfaces, as hereinbefore described.

"7. The application and use of a guard-piece, dividing plate or separater, for the purpose and manner hereinbefore described.

"8. The application and use, in combination with feeding and gathering mechanism, of means for adjusting the relative heights of such mechanism as hereinbefore described."

The Defendants were manufacturers of sewing-machines at *Oldham*, and the Plaintiffs charged them with making and selling a contrivance called a "friller," which was to be attached to their sewing-machines for the purpose of making ruffles and frills in such a way as to infringe the 3rd, 4th, and 7th articles of the Plaintiffs' patent. They accordingly filed the present bill, and obtained an interim injunction.

The Defendants put in an answer admitting the infringement for the purpose of the suit, but submitting that the Plaintiffs' patent was invalid. The answer contained the following passage: "We are advised and submit that what is in fact claimed by the said specification is the principle of producing by machinery results that were before obtained by hand, but without making any limitation as to the kind of machinery that may be used; and that the claims made by the said specification are not properly the subject of letters patent, and are so wide and general as to render the said letters patent wholly invalid and ineffectual at law."

The Plaintiffs then moved before the Vice-Chancellor for issues on the questions whether *J. H. Johnson* was the first inventor; whether the invention was new; and whether the specification sufficiently described the patent. The Vice-Chancellor considered that, having regard to the objection raised by the answer to the validity of the patent on the face of the specification, the question of granting issues ought to be postponed to the hearing of the cause, and refused the application. From this order the Plaintiffs appealed.

When the case was brought before the Lord Chancellor, his Lordship was of opinion that there was no objection to granting issues at that stage of the suit, but that it was necessary first to decide the preliminary objection raised by the answer, and directed the arguments to be addressed to that question.

Mr. *Grove*, Q.C., and Mr. *Lawson*, for the Plaintiffs:—

The mere fact of the claim being too general and abstract will not invalidate the patent if the process and machinery are

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sufficiently described, because the claim will be confined by the description of the process: *Kay* v. *Marshall* (1); *M'Alpine* v. *Mangnall* (2); *Johnson* v. *Rylands* (3). If a man discovers a principle, and also a mode of carrying it into practice so as to produce a useful result, he is entitled to protection against all other modes of carrying the same principle into practice for obtaining the same result: *Jupe* v. *Pratt* (4). It is impossible for the Court rightly to understand the effect of the specification without going into evidence, which will be done when the issues are tried and the whole question will be open: *Betts* v. *Menzies* (5).

Mr. *Dickinson*, Q.C., Mr. *Hamilton Humphreys*, and Mr. *Aston*, for the Defendants:—

There is quite sufficient on the face of the specification to shew that the patent is bad. In judging whether a claim is too wide, the true test is, What would another person be prevented by the patent from doing? In the first claim there is nothing to limit the patent to any particular process. It applies to all machinery for making ruffles and fastening them to the fabric by a series of single stitches. If another person invented another process for doing the same thing, would it not be covered by the claim? It is true that the patent speaks of improved ruffles; but the claim is not for improved ruffles, but for a mode of making ruffles, without specifying any particular kind of machine: *Foxwell* v. *Bostock* (6); *Thomas* v. *Foxwell* (7); *Wyeth* v. *Stone* (8); *Curtis* on Patents (9); *Jordan* v. *Moore* (10); *Hill* v. *Thompson* (11).

The second claim includes all kinds of ruffles and gathered work, which are not the proper subject-matter of a patent at all. There is no new mode of making them referred to in the claim: *Brunton* v. *Hawkes* (12); *Ormson* v. *Clarke* (13); *Tetley* v. *Easton* (14).

The third claim is also bad, because it does not shew how the Plaintiffs' contrivance is to be attached to the sewing-machine;

(1) 1 My. & Cr. 373; 2 Webst. 39.
(2) 3 C. B. 496.
(3) Ex. (not reported).
(4) 1 Webst. 146.
(5) 11 W. R. 1.
(6) 10 L. T. (N.S.) 144.
(7) 6 Jur. (N.S.) 271.
(8) 1 Story, 273.
(9) Sect. 148.
(10) Law Rep. 1 C. P. 624.
(11) 3 Mer. 629.
(12) 4 B. & A. 541.
(13) 13 C. B. (N.S.) 337.
(14) 2 E. & B. 956.

and also, it would extend to prevent those who had bought one of the Plaintiffs' machines from using it in combination with an old sewing-machine.

LORD HATHERLEY, L.C.:—

I am of opinion that I cannot determine this case in the mode in which it is sought by the Defendants to be determined, from a simple inspection of this specification. I have felt from the beginning that the ordinary course pursued in patent cases, by which the common issues are directed, is far more convenient. By that course, any question which arises on the specification is left perfectly open; and after evidence has been given, which assists the Court in coming to a right conclusion, an opportunity is afforded to the Defendants of saying, that on the face of the specification itself there is so much extravagance in the claim as to induce the Court to say that by reason of that extravagance of claim the patent is invalid. The inconvenience of a contrary course is exceedingly great, because, until you have the evidence which explains what the real state of the discovery is, and what the present mode of working is, you never can get at a full and complete understanding of the patent itself. A claim must be very large and very vague indeed to justify any Court in saying that it is impossible to sustain a patent based upon it. Such was the case of *Wyeth* v. *Stone* (1), which is mentioned by Mr. Justice *Curtis* in his work upon Patents (2), where he speaks of a person having invented some mode of cutting ice, and then stating in his claim, "I claim every mode of cutting ice, except by human power." If a man chooses to put forward his claim in so preposterous a form as that, of course he must take the consequences.

It is a singular fact, and one which creates a difficulty on the part of the Defendants, that no case has been cited from our English law books of any claim being held to be too large on account of the greatness of the claim, independently of the external evidence. The case of *Jordan* v. *Moore* (3) was perhaps the nearest. That was a case where a person claimed in one part of the claim "an iron frame for vessels, in combination with a

(1) 1 Story, 273. (2) Sect. 148.
(3) Law Rep. 1 C. P. 624.

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certain arrangement of wood, forming a lining either without or within this iron frame;" and in another part of the claim he spoke of "the iron frame as herein described." It was held that, by using the two forms of claim, he shewed that he intended the first to be more general than the second; and that his object was in the first to make a general claim to every ship constructed with an iron frame, and which was lined within or without with wood. Therefore the Court, having evidence before it that there had existed ships with iron framings similar to that which the Plaintiff claimed, held that the claim was too large. But that is a very different case from that I have now to consider. The inventor here begins by telling us what the invention is. He says: "The said invention relates to an improved ruffled frill or gathered fabric, and to the machinery for making the same." That is to say, "I have invented an improved ruffle, and that improvement is achieved through the medium of machinery, and that machinery I will proceed to describe to you." Then he says: "Which ruffle, frill, or gathered fabric differs from all others hitherto made, inasmuch as a single series of stitches firmly holds the gathers together, and attaches them to an ungathered fabric, such as a dress or a strip of cloth, instead of requiring a second series of stitches to attach them to an ungathered fabric." He says: "I make my improved ruffle by machinery, and nothing but machinery will avail to make my improved ruffle." He then proceeds to describe the machinery by which this is done. [His Lordship then read the material parts of the specification, and continued:—]

I do not think that the proper way of dealing with this question is to look first at the claims, and then see what the full description of the invention is; but rather first to read the description of the invention, in order that your mind may be prepared for what it is the inventor is about to claim. He tells you that he has now described, and particularly ascertained, the nature of his invention and the manner in which it is to be performed; and then, in the claim, we do not find anything asserted or claimed as his invention beyond what is found in the previous part. And it is to be observed that he reserves to himself the right of making modifications in the machinery to produce similar results. In the first head of claim he claims "the production, by machinery, of ruffles, frills, and gathered

work, and the simultaneous attachment of the same to a plain fabric, by means of a single series of stitches which serve both to confine and stitch the gathers, and also to secure one fabric to the other." Now, I am invited to consider that as a general claim of all machinery that ever may be invented hereafter which can perform the operation which he here describes. But he introduces the claims by saying that his object is to state what he considers novel in his invention. He does not say that he is going to distinguish it from all possible future inventions of other people. I do not deny that the case might be brought, by evidence, within the case of *Jordan* v. *Moore* (1). If it were proved to be the case that this, after all, was only one of a series of inventions, and that as numbers of machines had been made anterior to this gentleman's machine, although not precisely the same, for effecting this very object, then the Court might have reason to say, "You fail not because you are claiming too much, but because your claim takes in that which has been already invented;" just as occurred in the case with regard to iron framing for ships. But when an inventor says that he is describing a new thing, and gives very full details, and says he will not exclude himself from making modifications which are substantially the same as his present invention, and then says that the object of his claim is simply to point out what he considers to be novel in what he has already stated, I think, in such case, it would be a strange perversion of the construction of the instrument to hold that he is intending to shut everybody out from any conceivable machinery which may subsequently be invented. This observation seems to me to apply to the objections to all the other three claims which are particularly commented on, because, although other objections have been introduced in argument, I think they are all included in the first objection.

I read, then, the first claim thus: the inventor claims the production, by machinery, of that which has not been done by machinery before. He says he has invented an improved ruffle and frill, and he states in what the improvement consists, and he describes the machinery—he does not call it improved machinery —by which it is produced; and he says, "I claim the producing

(1) Law Rep. 1 C. P. 624.

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of this by machinery, of which machinery I have given full details."

Then the second head of claim is this: "The production by machinery at one operation of gathered work, which is simply gathered and secured on itself by stitches." Mr. *Aston* says that must be bad, because the inventor has told you first of all that the peculiar gathering which he operates on is only by avoiding the "whipping," which is said to scratch the material of the ruffle, and he says that is hardly an operation the subject-matter of a patent. I cannot come to any such conclusion. I cannot tell that the ruffle produced in this way so as to be free from scratches is not more durable and more elegant in its appearance than one which is subject to that defect. Therefore if he produces a machine, and dispenses with a process which is avowed to be injurious, I cannot, in the absence of evidence, take on myself to say that that would not be the subject-matter of a patent. But then Mr. *Aston* objects that the claim is applicable to all kinds of ruffles that may be made. But though it may be applicable to all kinds of ruffles, it is only applicable to those which are made by one operation instead of the double operation of whipping in the first place and stitching afterwards. If the whipping be prejudicial, which I cannot take on myself to say is not the case from my own knowledge of these things without evidence, he may have invented a very useful thing, and may produce it by machinery in the manner which he has here described.

Then the third head of claim is: "The combination of mechanism for forming ruffles, plaits, or gathers with the mechanism of a sewing-machine, for the purpose of simultaneously gathering fabrics and attaching the same by stitches to another fabric, or for the purpose of making gathered work, which is simply gathered and secured on itself by one operation." Mr. *Dickinson* says first upon that, that the inventor cannot claim a patent for this combination, because if you had bought one of these patented machines, and then happened to possess a sewing-machine, you would not be at liberty to bring them together for performing this operation. I apprehend that is not a just criticism, because what he claims is this: "I have invented a totally new machine, which is of such a valuable character that it will combine with other machines, and perform an

operation of considerable value in that combination." When you have purchased his machine you have purchased the right of using it with a sewing-machine, or in any other way that you may think fit; but you must not use his machine with a sewing-machine unless you have purchased it. But then Mr. *Aston* objects that the patentee has not described the mode in which that is done; therefore either it is a thing so simple that it requires no explanation, and therefore is not the subject-matter of a patent, or if it is not simple, he has not shewn how it is to be done. The answer to this objection is, that it is simple enough when you have got the Plaintiffs' machine to apply to a sewing-machine. The patentee gives you a drawing shewing how it is done, and the reason of the simplicity of the combination is, that he has invented a machine which is so easily combined with a sewing-machine that a simple drawing is sufficient to explain it.

It is unfortunate that the case has been brought on in this way. It may be that when the issues are tried it may turn out, as in *Jordan* v. *Moore* (1), that after all there have been previous inventions so similar to those of the Plaintiffs that the patent is invalid; but that is no ground for my holding it to be *per se* too large. I think, therefore, all I can do on the present occasion is now to direct the issues which are asked.

Solicitor for the Plaintiffs: Mr. *J. H. Johnson.*

Solicitors for the Defendants: Messrs. *Johnson & Weatheralls,* agents for Mr. *E. Storer, Manchester.*

(1) Law Rep. 1 C. P. 624.

L. C.

1871

April 17, 18, 20, 21; *May* 3, 24; *Aug.* 2.

WARRICK *v.* QUEEN'S COLLEGE, OXFORD.

Rights of Common—Freehold Tenant suing on behalf of others—Inhabitants—Origin of Rights—Loss of Rights—Land built upon.

The freehold tenants of a manor must have in common some rights over the waste as against the lord; and therefore one freehold tenant of a manor, claiming by prescription on a presumed grant, can sue on behalf of himself and all the other freehold tenants of the manor to protect their rights over the waste of the manor as against the lord.

Where rights of common have been exercised for many years, the Court will try to find a legal origin for those rights.

Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the Court will presume that the inhabitants claimed through the freehold tenants.

A freehold tenant of a manor does not, by ceasing to pay quit-rents, and by neglecting to claim admittance, lose his rights as against the lord.

Quære, as to the effect of building on the land, with respect to rights of pasture, rights of cutting turf, and of digging gravel on the waste.

Decree of the Master of the Rolls affirmed.

THE bill in this case was filed by *John Warrick*, *J. Goldsmid*, *W. E. Dawson*, and *J. Jacobs*, on behalf of themselves and all the other tenants of the manor of *Plumstead*, in the county of *Kent*, as Plaintiffs, against the Provost and Scholars of *Queen's College*, in the University of *Oxford*, and the Rev. *W. Jackson*, as Defendants, to restrain the college from inclosing certain commons.

The college were the owners in fee of the manor of *Plumstead*, and the four Plaintiffs claimed to be freehold tenants of the manor. The Plaintiff *Warrick* was held by the Lord Chancellor to have established his title as a freehold tenant of a house and orchard which were part of the manor; but *Warrick* had never paid quit-rent or been admitted a tenant of the manor, and the quit-rents over the whole manor had fallen into abeyance, nor had any tenants been admitted for more than half a century. There appeared to be other freehold tenants, though one of the Plaintiffs had not shewn himself to be a tenant.

Within the manor are three commons—*Plumstead Common*, containing about 110 acres; *Bostal Heath*, 55 acres; and *Shoulder of Mutton Green*, about 4 acres.

The bill alleged that for a period of thirty years next before the acts of the college thereby complained of, and longer, the predecessors in title of the Plaintiffs, and the Plaintiffs and the other freehold tenants of the manor, had enjoyed as of right and without interruption the following common rights, as to pasture for commonable cattle, appendant, and as to all other rights of pasture and other common rights, appurtenant to their several tenements held of the lords of the manor: 1. A right of pasture upon the three commons for all sorts of cattle levant and couchant, as well commonable as others, and a right to feed geese, ducks, and such like birds upon *Shoulder of Mutton Green.* 2. A right of estovers, and hay-bote and wood-bote and turbary, to cut so much turf, furze, gorse, fern, and underwood upon *Plumstead Common* and *Bostal Heath* as might be required for fuel to be consumed upon their tenements, and for purposes of fodder and litter for cattle levant and couchant on their tenements, and for other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of their tenements, and to dig so much loam, sand, and gravel upon the said commons as might be required or necessary for the beneficial enjoyment of their tenements. 3. A right to use the whole of the three commons for walking, driving, and riding on horseback, and for the enjoyment of air and exercise, and for amusement and recreation, and particularly as to *Shoulder of Mutton Green,* a right to use the same for all rightful village sports, games, and pastimes, and other rights, privileges, and customs.

The bill also contained allegations to the effect that in or about the year 1866 the college inclosed various parts of *Plumstead Common* and *Bostal Heath,* and inclosed nearly the whole of *Shoulder of Mutton Green,* and stopped up ancient paths over the common, and threatened to inclose still more of the waste, to erect houses and other buildings on the land so inclosed, or some of them.

In August, 1866, this suit was instituted, and the bill prayed for a declaration that the Plaintiffs and the other freehold tenants of the lords of the said manor were entitled to the various common rights already mentioned; and for an injunction to restrain the college, their servants, agents, and workmen, from inclosing or

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suffering to remain to be inclosed any part of the three commons, and from in any manner disturbing or interfering with any rights of the Plaintiffs and the other freehold tenants of the lords of the said manor on and over the three commons; and that the Plaintiffs and the other freehold tenants might be quieted in the possession and enjoyment of their rights.

To this bill the Defendants, by their answer, and at the Bar, raised several defences, which will be found stated in the arguments of the counsel and in the judgment of the Lord Chancellor.

A great quantity of evidence was produced, consisting principally of the Court rolls, but also of parol evidence as to the exercise of the commonable rights claimed by the Plaintiffs, the effect of which is stated by the Lord Chancellor in his judgment.

The suit came on for hearing before the Master of the Rolls, who made a decree in favour of the Plaintiffs, except as to *Shoulder of Mutton Green*, as reported (1).

The Defendants appealed.

Mr. *Manisty*, Q.C., Mr. *Jessel*, Q.C., Mr. *Lindley*, and Mr. *Elton*, for the Defendants:—

There is no statement in the bill who are the freehold tenants, or how many there are, or what are their rights; and how can the Court come to any decision on such a bill? How does it appear that these Plaintiffs are tenants: they have not been admitted, they have paid no quit-rents and no reliefs. It is possible that the lord may by neglect have lost his rights; but how does it appear that these persons are tenants of the manor? All they shew at the utmost is, that they hold pieces of land which formerly formed part of the manor.

Moreover, these are freeholders, and do not claim by a custom which would extend over the whole manor, and be common to all, but each freeholder claims by a presumed grant which may have been different in each case. There are several commons, and is it credible that all freeholders had the same rights over all the commons? How then can all the freeholders be joined as co-Plaintiffs? The rights exercised by one freeholder prove nothing as to the rights of any other freeholder, and yet the decree gives all

(1) Law Rep. 10 Eq. 105.

the same rights, and allows them common for all beasts, whether commonable or not: *Duke of Portland* v. *Hill* (1). This is not a bill of peace, and cannot be sustained: *Powell* v. *Earl Powis* (2); *Smith* v. *Earl Brownlow* (3); *Mayor of York* v. *Pilkington* (4); *Earl of Dunraven* v. *Llewellyn* (5). The right of common is only appendant to arable land, and there is no proof that any of the Plaintiffs have any; the nearest to it is an orchard, as to which the right is doubtful. Moreover, nearly all the land held by the Plaintiffs has been built upon, which extinguishes the right of common of pasture: *Carr* v. *Lambert* (6).

Sir *Roundell Palmer*, Q.C., Mr. *Williams*, Q.C., and Mr. *W. R. Fisher*, for the Plaintiffs:—

The Defendants have misconceived the object of the suit. The lord claims the right to appropriate the whole of the commons and to deprive the tenants of all their rights, whatever they may be, and the tenants must be able to protect themselves. There is no allegation or evidence that there is any difference in the rights of the different freeholders; it is a mere suggestion. Even if there should turn out to be other tenants with different rights, we still keep ours. The writ of *monstraverunt* shews that each freeholder is not compelled to sue alone; and the only difference between a freeholder and a copyholder is, that a copyholder cannot prescribe: *Foislon* v. *Crachroode* (7); *Hoskins* v. *Robins* (8); *Perryman's Case* (9); *Griesley's Case* (10); *Nelson's Lex Maneriorum* (11). As to common appendant, that is so universal that all the tenants will be presumed to enjoy it. *Powell* v. *Earl Powis* may be explained by supposing that the rights of the commoners could not be proved: *Potter* v. *North* (12). The presumption will be that the same rights prevail: *Gateward's Case* (13); *Constable* v. *Nicholson* (14).

As to the inhabitants who appear to have exercised rights, the origin of such rights is, that they inhabit houses built on the lands

(1) Law Rep. 2 Eq. 765.
(2) 1 Y. & J. 159.
(3) Law Rep. 9 Eq. 241.
(4) 1 Atk. 282.
(5) 15 Q. B. 791.
(6) Law Rep. 1 Ex. 168.
(7) 4 Rep. 31, b.
(8) 2 Wms. Saund. (Ed. 1871) 726.
(9) 5 Rep. 83, b.
(10) 8 Rep. 38, a.
(11) Page 54.
(12) 1 Wms. Saund. (Ed. 1871) 635
(13) 6 Rep. 59, b.
(14) 14 C. B. (N.S.) 230.

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held by the tenants: Vin. Abr. (1). *Corbet's Case* (2), *Attorney-General* v. *Parker* (3), and *Rex* v. *Davis* (4), are also authorities as to the commonable rights of inhabitants. It is clear on the evidence that there was an enjoyment from very ancient times of rights of common, either appendant or appurtenant; and the presumption must be that these rights were granted with the tenements, and may have been appurtenant to ancient houses. If a right of common has once existed, the present state of the land is immaterial: *Carr* v. *Lambert* (5). The freehold tenants have not lost their rights by non-payment of quit-rents or non-performance of service, though the lord may have acquired a right to seize: *Chichester* v. *Hall* (6). If courts were not held so that the tenants could not be admitted, that was the fault of the lord.

Mr. *Manisty*, in reply:—

Instead of this being a bill of peace, and so ending the matter, the decree will involve an inquiry into the case of every freeholder, and will do no good whatever. We must admit that there may be freeholders who have some rights in common, but not all rights in common; and there are clearly other persons who have rights, and who ought to be parties. The Defendants do not intend to inclose all the waste, though they may have a right to do so. Even admitting that every freeholder has a right to common of pasture, the decree goes too far, and gives all the freehold tenants common of turbary, and a right to dig gravel and other rights. *Follet* v. *Troake* (7) merely decides that common law rights may be controlled by custom; but there can be no custom in freeholds, and the Plaintiffs must prove their rights, which they have not done; and, moreover, each tenant must shew that he has exercised his rights, in which the Plaintiffs have altogether failed.

Aug. 2. LORD HATHERLEY, L.C.:—

I have been compelled to delay giving my judgment in this case for what may appear a somewhat unreasonable time, because,

(1) Vol. iv. p. 588.
(2) 7 Rep. 5, a.
(3) 3 Atk. 576.
(4) 6 A. & E. 374.
(5) Law Rep. 1 Ex. 168.
(6) 17 L. T. (O. S.) 121.
(7) 2 Raym. 1186.

although there are some broad facts which ought to suffice for the determination of the case, still it was necessary to go over, as I have done very carefully, most of the documentary evidence which is contained in the Court rolls of the manor in question, and a great quantity of evidence with reference to the title of the several Plaintiffs, and to the exercise by them of acts in pursuance of their rights as claimed by the bill.

This suit is to establish the title of the Plaintiffs, as holding freeholds of the manor of *Plumstead*, to exercise for their own benefit various rights upon the waste soil of the manor, such as a right of common for their commonable beasts, and for their other than commonable beasts; a right also of estovers with respect to gorse and fern and underwood, and a right of cutting turf, which is alleged in two ways—as a common law right of turbary, and a special right with regard to cutting the turf from the soil of the waste. The question is, whether these rights are vested in the Plaintiffs in such a manner as that they can sustain a suit against the present lords of the manor, *Queen's College*, who have since the year 1860 controverted and denied the existence of any such rights, by issuing notices threatening with legal proceedings all persons attempting to exercise any of those rights, and who claim an absolute right to deal with the waste of the manor as they please.

That is a very broad controversy, and it certainly would be very fatal in the interests of justice if, in the face of the evidence that I have here before me, such a claim on the part of the lords of the manor could be sustained. I have before me the Court rolls of this manor extending over two hundred years, from which there appears most abundant evidence of some persons (I do not at present say whom) not only having without interruption exercised all these rights which I have mentioned, but having sometimes at Courts Leet, and sometimes at Courts Baron, more often at Courts Leet with view of frank pledge, laid down rules and regulations under which these rights might be exercised by those who had a right to exercise them, whoever they might be. For more than two hundred years, whenever Courts were held, we find these things always done, without any resistance on the part of the lord or any question on the part of the steward.

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To contend that no such rights had existed would, of course, be hopeless on the part of the lords, and therefore their case has been that all these rights may have existed, but that the lords, as the undisputed owners of the soil, can, before the Plaintiffs establish their rights, put them to the proof whether the right is vested in *A.*, *B.*, *C.*, or *D.*, although it may be that *A.*, *B.*, *C.*, and *D.* have for more than two hundred years been exercising these rights.

Now, as I have said, this is a large and broad view of the case, which strikes one at first sight, and it cannot be disputed that the Court is entitled, nay, bound by authority—not merely from an inclination towards any abstract rule of justice—when it finds rights which have been exercised in the manner I have described, to find the origin of them in some way if it can. If that cannot be done, the right cannot be established, however long it may have been used.

That being so, the principal controversy has in reality been, whether there has been a clear and definite exercise of these rights on the part of the freeholders of the manor, who are represented by the Plaintiffs. It so happens that the manor has no copyholders; if they ever existed, they have disappeared.

With regard to the condition of freeholders of customary manors, there can be no doubt that they are in a different position from that of copyholders. Copyholders can allege a custom in the manor, the whole of the manor being subject to the custom; and they deal with their lord as if he had at some former time made a grant to them of certain rights. Those rights may sometimes be of a very strong and high nature, as was exemplified in the case of *Marquis of Salisbury* v. *Gladstone* (1), where Lord *Cranworth*, in addressing the House, said, that when a custom was said to be void because it was unreasonable, nothing more was meant than that the unreasonable character of the alleged custom proved that the usage, even though it might have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times.

Now, as regards the freeholders: one right which the common law seems to give to all tenants of arable land whatsoever in freehold, is a right of common on the lords' waste for all beasts em-

(1) 9 H. L. C. 692; 8 Jur. (N. S.) 625.

ployed in agriculture, and this was not disputed by Mr. *Manisty* on the part of the Defendants. As far as regards that right, therefore, all the freeholders would be in an exactly similar condition, and the Plaintiffs would be free from some of the objections as to the frame of the suit, and from the objection as to hearsay evidence.

Then, when we look at the Court rolls, we find a number of other rights exercised by somebody; and the course of proceeding seems to have been this: The freeholders certainly were held to have a special interest in the waste, independently of the common law right of common appendant, because although, no doubt from carelessness, the rolls of the manor were not always kept in the best possible form, yet we do find, as a general rule, that when a part of the waste was to be granted, the assent of the freeholders was given, and especially where there was a grant of part of the waste for building a cottage, the assent of the freeholders to the building of that cottage was given. It is quite true that sometimes we find the parishioners assenting, and other parties also; but that can, as I shall shew, be explained. We also find, from the very earliest time, entries with reference to the cutting of turf to be used for fuel:—[His Lordship then mentioned such an entry in 1688.]

Looking to the doctrine which I have found laid down in all the cases, and which no one will dispute—that we are compelled to find a legal origin for a custom of this kind if we can—we must now consider what legal origin can be attributed to this undoubted right exercised by these parties, and continued to be exercised for so long a period as from the year 1689, of making regulations and bye-laws with reference to gorse, fern, and other matters which the authorities cited seem to shew can properly be made by a Court Leet respecting usages upon the common.

This brings me to what has really been the difficulty in the case, which I have anxiously considered, to see whether it could or could not be overcome, it being the duty of the Court to seek a way of overcoming it, by finding, if possible, the legal origin of the right. I rather think that the difficulty arises from our somewhat artificial system of law. I am not, of course, venturing to overrule or shake any of the established authorities; but the real difficulty is this: In ancient records traces are to be

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found of customs (prevalent anterior, I think, to our feudal history, and belonging to a period of greater freedom), such as having lammas-fields, that is, fields which are used during a certain portion of the year by all the tenants of the manor, and during a certain other time are lying waste: also of a custom as between the whole body of those who settled upon a place and their lord, to have an equal allotment to them of land which they might hold in severalty for a certain period of the year, and have rights exerciseable in common upon it during the rest of the year. So also that the inhabitants, that is to say, those who were free persons occupying houses, whether coupled with land or not (if they were not coupled with land, they would not carry common appendant), do seem as a matter of fact—and I am now speaking only of fact and not of law—to have acquired rights by which they could avail themselves of the woods for the purpose of feeding swine, and of the commons not under cultivation for their cattle; these rights sometimes extending to the cutting of turf, the digging for gravel, and the like.

But the law has said that there are two courses of dealing with such rights; a right by custom may be claimed, which is the case of a copyholder, or a right by prescription may be claimed, which is the case of the freeholder. The freeholder stands upon the presumed grant of his freehold, and he prescribes for himself, and all those in whose interests he stands, to have the use of certain things, which for a time beyond legal memory have been attached to the land which he has as freeholder. And it has been held (and here arises the principal difficulty in this case) that inhabitants are not in a condition to prescribe, because there never could have been a grant to them, inasmuch as they are not a corporation. The Plaintiffs were, therefore, rightly advised in this case in framing their suit as a suit by prescription in right of the freeholders, and not of the inhabitants.

Now let us see, whatever may, to a certain extent, seem, upon the rolls of this manor, to have been the course of dealing, whether there is not really a proper legal origin to be attributed to such right. I think I can see my way to saying that here the freeholders take by grant, which of itself carries the common appendant, and we find these freeholders, having the right to exercise

these various privileges upon the waste soil of the manor, though we find afterwards a number of persons as inhabitants also exercising their rights. In this state of things, I think that the correct view is, that the right being vested in the freeholders as such, of course is exerciseable not by themselves only, for it is exerciseable by the tenants under them; and therefore this body of inhabitants who are constantly brought in must have originally taken by some title or other derived from the original owner of the soil. The soil was granted out to the freeholders, who may from time to time have disposed of interests of greater or less duration, to the different persons who claimed through them as their tenants, and who exercised those privileges which the freeholders may be taken in the first instance to have acquired from the lord.

Having given this general view of the possible origin of the rights in the manor, which are to be found traced in such strong characters as having been exercised by large bodies of people, I will now proceed to the difficulty which was raised at the outset of the case as to the frame of the suit, and the possibility of maintaining any such suit as this, in respect of the common right vested in the freehold tenants of the manor.

The argument which was pressed upon me very much by Mr. *Manisty*, fortified by the case of *Earl Dunraven* v. *Llewellyn* (1), was that a number of freeholders could not join together as Plaintiffs and assert a common right, for they had no such right at all. The persons who claim by a custom prevailing over the whole district all come under one uniform custom, but persons claiming by prescription necessarily claim by grant; and how can we tell what would appear in each grant? Each grant may have a separate right connected with it; nor could hearsay evidence be admitted, on the very ground that this was not a common right, but a case of each single person claiming by prescription. I think there is very considerable fallacy in those arguments. In the first place, as regards authority, we know there was a very well-considered case of *Powell* v. *Earl Powis* (2), which was before the Chief Baron *Alexander*, who knew as much of the pleadings of the Court, I think, as any man who ever presided in a Court of Equity; in which case I take it that the Judge, if he found that the law was

(1) 15 Q. B. 791. (2) 1 Y. & J. 159.

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adverse to the rights being put together as a common right in respect of which a suit might be maintained in this Court, would have allowed the demurrer. But that was not done, and for very good reasons. What is there to prevent these persons who claim by prescription from having had a grant common to all, with perhaps different privileges contained in their respective grants? It is curious enough that in a valuable note on the case of *Earl of Dunraven* v. *Llewellyn*, made by Mr. *J. Williams* (1), a grant in *Wales* is mentioned, by which a person granted land to certain tenants, with all the uses, privileges, and advantages which had been granted to other tenants. This is an instance of what may be possible and legal: and taking Lord *Cranworth's* view in *Marquis of Salisbury* v. *Gladstone* (2), that when you find a right of such long-continued duration you are bound, if possible, to ascribe to it a legal origin, can it be said that it would be unreasonable to hold that this right had originated in the grant to every freehold tenant of all the rights and privileges which every other freehold tenant had? That would account at once for what is found in this case. There are a number of persons exercising common rights in the face of the lord or before his steward; and in such a case I apprehend that I am bound to find that such common rights existed. It may be, of course, that the tenants had separate grants, and that a particular house was free from some claim or demand on the part of the lord from which others were not free; for instance, from quit-rent, or something of that kind. But that would not at all prevent their having certain large privileges in common with others. I take it that the view of this Court is, that all persons having a common right, which is invaded by a common enemy, although they may have different rights *inter se*, are entitled to join in attacking that common enemy in respect of that common right. I may take an instance from modern times. There may be classes of shareholders in a railway company who have different rights *inter se*, but they may all have a common enemy in the shape of a fraudulent director, and they may all join, of course, in one common suit against that director, although after the common right is established they may have a considerable litigation among themselves as to who are the persons entitled to the gains obtained through that suit.

(1) Wms. R. Pr. 9th Ed. 480. (2) 9 H. L. C. 692.

[His Lordship then stated what was clearly and distinctly proved by the Court rolls. Rules were constantly made with reference to the different privileges, and these rules in themselves proved the existence of the privileges. From an early date certain privileges were assigned to certain persons—inhabitants—far more constantly inhabitants than others. There was clearly proved by the books, as far as they went, the ancient right and use of common for commonable cattle, and also for cattle not commonable, such as pigs. There were also proofs of a right to take estovers in the shape of furze, about which there were a great many regulations, and also of a right to cut turf for burning. These rights were asserted over and over again, and rules were laid down for their exercise, the common course being to hold the Court Leet and the Court Baron on the same day. In almost every case the customary freeholder was present, attending as one of the homage of the Court Baron on the same day on which the Court Leet was held, and a difference was made between inhabitants and freeholders in the amount of fines for non-attendance. There were also resolutions which regulated the rights of the persons who claimed to exercise rights, inflicting fines upon certain persons exercising the rights. Either the whole fine went to the lord, or half of the fine went to the lord and half to the poor of the parish. That shewed, no doubt, that some customs grew up which it might be very difficult to establish as matter of right upon the part of those persons who might be disposed to assert them; but this did not shew any right in the lord to prohibit acts done *de jure*. It only shewed that where unlawful acts were done contrary to the rules of the manor, certain fines were inflicted; and it might well be that the lord would acquiesce in an arrangement of that kind without asserting anything against the general privilege; but there was nothing to contradict the rights of the freeholders. It was impossible to deny, upon the evidence, that persons had been let in who were not *simpliciter* freeholders; but still they were persons who might have derived title through the freeholders as their tenants. At all events, the rights were in no sense contradictory, except that there was a greater number of persons let in to partake of that which, if the freeholders alone were to enjoy it, would give them a larger right than they had when it was participated in by others.]

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As to the statute 3 & 4 Will. 4, c. 71, and the question whether there has been any interruption which might prevent the right being asserted, I do not think it necessary to inquire into that part of the case, because the prescription may be proved. The statute only applies to cases where you want to stand upon thirty years' user; but here, where the title is one of 200 or 300 years, that statute is not needed, and the title can be rested upon the original right before the passing of the statute.

There should, however, be some title besides that upon the documents; but there is really abundant evidence of that nature. It was disputed whether, in fact, it could be shewn that the right here claimed to be exercised had been exercised in respect of any particular property which is now vested in any one of the Plaintiffs; and on this point there was much evidence given. However, it was clear, and came at last to be admitted that, assuming that the right of the freeholder was not forfeited by his non-admission and his non-performance of suit and service, Mr. *Warrick* had made out a right.

Mr. *Warrick* has made out his claim in respect of a house with some land, and therefore there is one freeholder who has some right in that respect. And if I find but one freeholder in that condition amongst the Plaintiffs, I have a person who has a right to sue on behalf of himself and all others; but there must be a trifling alteration in the decree of the Master of the Rolls in that respect, which must speak of "the Plaintiff *Warrick* and all others who are freeholders."

Then the question is, first, whether Mr. *Warrick* has exercised his rights? I think it is abundantly proved that the right has been exercised with reference to commonable beasts. I am bound to take it that it has been exercised in right of that freehold which he has, if I find him exercising it at all, unless it can be clearly shewn that he has exercised it in respect of some other freehold or some other property. You are bound to assume that he has exercised the right in respect of that title which you find upon the records in the Court rolls. I am not sure whether every one of the rights was exercised by Mr. *Warrick*. I have not gone fully into that question, because I apprehend that in this particular case, when we find from the Court rolls that we are

justified in arriving at the conclusion, that in the prescriptive grant to the original freeholder there were included these rights which I find in the books and by the evidence of the Court rolls to have been exercised from all time, then I think we arrive at a position in which there is a public right of so large a description, that the evidence of all other persons holding exactly in the same position becomes admissible. As I read the case of *Earl Dunraven* v. *Llewellyn* (1), it went upon the particular circumstances of the case, in which the prescriptive right which was alleged by the different persons might be wholly irrespective of any common right or common grant amongst them all. But here it is clear to me, upon the evidence, that the freehold tenants always had all these rights, which I must presume to have been granted to them at the same time and generally to all in their position. If so, there is abundant evidence that the different rights which have been alleged have been exercised.

The bill raises a question as to three places—*Plumstead Common*, *Bostal Heath*, and a third place, called *Shoulder of Mutton Green*. *Shoulder of Mutton Green* is a small place as to which the right of the people to amuse themselves arose, and the Master of the Rolls has disposed of that altogether, and, as it seems to me, quite rightly, has put that out of the case, considering that no case was made about anything done on *Shoulder of Mutton Green* with respect to which a decree could be asked. His decree is confined to *Bostal Heath* and *Plumstead Common*.

Having got so far as this—that I think there is a person on the record who has a right and is entitled to maintain it—there are several other defences which I am obliged to notice. The first is that which I have just alluded to, namely, that the quit-rents have not been paid, and suit and service have not been rendered. But I apprehend that that is not forfeiture. A freehold is not like a copyhold which the lord seizes for forfeiture. In *Chichester* v. *Hall* (2) it was decided that rights vested by way of prescription in freehold tenants would not be lost by the circumstance of their not being admitted, or not having rendered suit and service. There is no authority, certainly none was cited, for shewing that a freeholder having a prescriptive right to these privileges upon the

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(1) 15 Q. B. 791. (2) 17 L. T. (O. S.) 12.

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waste lost them or was deprived of them by not paying quit-rents or not performing suit and service, or that the lord was entitled to assert his rights by forfeiture. The lord has other remedies. Persons appear by the Court rolls to have been fined for not coming in at the proper time to take up their freeholds, and to render their suit and service. The lord may be entitled to pursue that right, but I do not think there is anything in the non-performance of those duties which deprives Mr. *Warrick* of his right to insist upon the privileges which I hold that he, as tenant of the freehold, is entitled to.

Then other difficulties were raised with regard to some of the Plaintiffs. The title of one Mr. *Jacobs* has not been shewn. As to the other two, they are in a doubtful position; but I think the case can stand on Mr. *Warrick's* title, which will entitle these Plaintiffs to relief.

There is another point, which is as to the right of turbary, and it applies in some respects also to other rights. It was said that this right might extend to any new house that might be built, and I think it is impossible to say that there is not a right established of cutting turf for the use of dwelling-houses, independently of the right of turbary, which can only exist *per se*. An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or, at the most, for the house which supplies the place of that house.

The building of houses was also relied upon as destroying common appendant. I do not think that is very material here, considering the other clear commonable rights which appear to me to have been proved. As regards the mere common law right of common appendant, the law I apprehend to be this: that if you can shew—which you very rarely can do at this date—that there was no arable land at all granted when the house was granted, then the right of common appendant does not arise. If you build upon your arable land so as to cover it all up, then the question arises whether you have not entirely forfeited the right of common appendant, because you have destroyed that in respect of which it was granted, namely, the arable land, for which alone the law assumes the grant. It has been held in several cases that turning arable land into pasture would not destroy the right,

because it was said that you might turn it back again; and so it was said with reference to a mere temporary building. If a person was minded to build, for a temporary purpose, wholly over that which was once arable, then that would not affect the right. But *Carr* v. *Lambert* (1) decides that if it is plain and clear from the act done that you mean to abandon the right, then the right is at an end.

But I hold these rights to be freehold rights granted by the lord—not simply common law rights as to common appendant, because, of course, that would not apply to gorse, furze, turbary, and various other things; and the question how far the rights are affected by the additional buildings, I think, does not arise—although I have had more doubt as regards the turf than upon any other point—because such rights might be unreasonably increased by the building of a whole town. I am told that streets have been built on some parts of this very place. I have satisfied myself that these bye-laws, which seem to have been recognised authority, which were made from time to time for the exercise of all these rights, and which were made in respect of all these commonable rights, would enable persons to deal as they thought fit, if they did think fit, with the accruing difficulties. No such rules or bye-laws have been made with reference to the building upon land, and I do not think, therefore, that I ought to say that any portion of these rights, which are proved by the evidence before me to have been granted, have been destroyed by the circumstance of the buildings having been erected.

I think I have now gone through the whole of the objections which were raised to the substance of the decree. There are other objections raised to its form; and the decree might be usefully amended, without in any way affecting the really material issues raised in the cause.

I propose, as I said before, to alter the declaration, and to declare that "the Plaintiff *John Warrick* and the other freehold tenants of the manor of *Plumstead*, in the county of *Kent*, are entitled as follows." Then I propose to alter the decree, though it is more by way of verbal criticism than anything else:—[His Lordship then specified the alterations.]

(1) Law Rep. 1 Ex. 168.

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It appears to me that the Appellants must pay the costs of the appeal, because the alterations which I have made are such as would have been made by the Master of the Rolls if he had been asked at the time to make them. Many of them are simple verbal alterations; but, at all events, they are not such as, I think, would cause any additional expense. The litigation has been occasioned by a high-handed assertion of right on the part of the college, who really seem to have said in effect to those who have been exercising their rights for 200 years: "You will be in a difficulty to prove how you have exercised them; we will put you to that proof by inclosing and taking possession of your property." I think, therefore, the whole expense ought to fall on those who have occasioned it, namely, those who have brought into question rights which have had so long a duration, and to which I am thankful to be able to discover (because it is the duty of the Court to discover, if it can,) a legal origin.

Solicitors for the Plaintiffs: Messrs. *Horne & Hunter.*
Solicitors for the Defendants: Messrs. *White, Borrett, & Co.*

L. C. 1871 ~ *May* 24, 25, 26, 29, 30; *Aug.* 2.

BETTS *v.* THOMPSON.

Practice—Misjoinder of Plaintiffs—Omission of Parties interested as Plaintiffs—Rights of Common—Freeholders—Copyholders—Sufficient Waste.

A bill was filed by a freehold tenant of a manor, suing on behalf of himself and all other owners of freehold tenements within the ambit or former ambit of the manor, to establish rights of common against the lord. It was proved that the Plaintiff and the other freehold tenants within the present ambit of the manor had commonable rights, and that the copyholders of the manor had also commonable rights, but it was not proved that the owners of freehold tenements within the former ambit had such rights:—

Held, that the joining as Plaintiffs the owners of freehold tenements within the former ambit amounted merely to a misjoinder of Plaintiffs, and did not prevent the Court from making a decree upon the bill:

Held, that though the Plaintiff might have sued on behalf of the copyholders also, if they had rights co-extensive with those of the freeholders, he was able to maintain his bill on behalf of the freeholders alone:

Held, that where the lord claims a right to inclose a part of the waste, the

onus of shewing that sufficient waste is left for the commoners lies upon the lord.

Decree of the Master of the Rolls affirmed.

THE bill in this case was filed by *Thomas Betts* on behalf of himself and all other the freehold tenants of the manor of *Tooting Graveney*, in the county of *Surrey*, and all other persons being owners of freehold lands and tenements within the ambit or former ambit of the said manor entitled to the commonable and other rights thereinafter mentioned, except the Defendant as Plaintiff against *W. J. Thompson* as Defendant. And the bill stated that the Defendant bought the manor in 1862; that the manor was formerly co-extensive with the parish of *Tooting Graveney*, and anciently comprised demesne lands of considerable extent lying within the said parish, which lands had at different times been conveyed away by the lords of the manor, and had ceased to be strictly parts of the manor, except as regarded the commonable and other rights; that the manor now comprised divers lands and hereditaments, and also about sixty-three acres of waste lands, the principal part of which was known as *Tooting Common;* that the waste lands were in part covered with turf and grass, and formed excellent pasture, and also contained gravel and loam; that the Plaintiff was seised to him and his heirs of a freehold tenement held of the manor, and also of other freehold lands within the former ambit of the manor, and the Defendant was the lord; that the Plaintiff and his predecessors in title, and the other freehold tenants of the manor, and the other owners of freehold tenements lying within the ambit or former ambit of the manor, and their predecessors, had for thirty years and upwards enjoyed over the waste common of pasture for all manner of beasts and animals levant and couchant, and rights to cut fodder, and to dig gravel and to use the waste for recreation; that the Defendant threatened to destroy the fern, &c., and to inclose the waste. The bill then stated, that from entries in the parish books it appeared that the inhabitants and parishioners had exercised a control over the common from time immemorial, and that the other freehold tenants of the manor were too numerous to be made parties. And the bill prayed declarations that the Plaintiff and the other freehold tenants of the manor, and such other owners of freehold tenements

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lying within the ambit or former ambit of the manor as aforesaid, were entitled to the rights above mentioned; and that the Defendant might be restrained from inclosing; and that the title of the Plaintiff and of the other freehold tenants and other persons on behalf of whom he sued might, if necessary, be ascertained by the trial of issues; and that the Plaintiff and the other freehold tenants and persons on behalf of whom he sued might be quieted in the possession of their rights, and, if necessary, a scheme settled to regulate the exercise and enjoyment of those rights.

The Defendant, by his answer, denied that there was now any freehold tenant of the manor, and denied that the tenants of the manor ever had any rights over the waste, except such common of pasture as was appendant to the lands held by the tenants; and he alleged that for a long time no one had exercised any right of common, except that trespasses had been committed in assertion of such right. The Defendant also stated the facts relating to an arrangement or compromise which had been made or partially made between him and the persons claiming to be interested in the common, and alleged that the Plaintiff was bound by this arrangement. And the Defendant contended that the lord could inclose the waste without the consent of the freehold tenants (if any), and without regard to the alleged rights of common.

Much evidence was entered into on both sides, the result of which appeared to be, in the opinion of the Master of the Rolls and of the Lord Chancellor, that the Plaintiff was a freehold tenant of the manor, and that there were shewn to be ten other freehold tenants; that the freehold tenants had rights of pasture and of digging turf and gravel on the waste; that there were copyholders who had also rights of common; and that the arrangement was not binding on the Plaintiff or the other freehold tenants.

The Master of the Rolls made a decree declaring that the Plaintiff and the other freehold tenants had certain commonable rights over the waste, and restraining the Defendant from putting up fences so as to prevent the commoners from exercising their rights (1).

The Defendant appealed.

(1) 1870. July 21. LORD ROMILLY, M.R., said that the question whether one freeholder could sue on behalf of himself and all other freeholders had very properly not been argued in this case, as he had so re-

Mr. *Jessel*, Q.C., and Mr. *C. T. Simpson*, for the Appellant, contended, on the evidence, that the Plaintiff had not made out his own title or that of the others on whose behalf he sued. Even if the Plaintiff had shewn that he and a small class of persons had rights, he could not maintain a bill on behalf of others who had different rights. If an injunction were granted, and it should afterwards appear that some of the alleged freehold tenants had no rights, could the lord upon their application be committed for an infringement?

The other arguments used on behalf of the Appellants are noticed in his Lordship's judgment. As to the defect from misjoinder, they cited *Mitf.* Plead. (1); *Pollock* v. *Lester* (2); *Evans* v. *Coventry* (3). The general question of the right of a freehold tenant to sue on behalf of himself and the other freehold tenants was not argued in this case, as it had been fully argued in *Warrick* v. *Queen's College, Oxford* (4).

Sir *Roundell Palmer*, Q.C., Mr. *Williams*, Q.C., and Mr. *Whately*, for the Plaintiff, contended that the Defendant had not shewn

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cently decided that question in *Warrick* v. *Queen's College* (Law Rep. 10 Eq. 105), which was under appeal.

But the Plaintiff had sued on behalf, not only of the freehold tenants, but of others within the ambit or former ambit of the manor. His Lordship entertained great doubts whether such persons could be included in the same suit, and whether each must not prove his particular right of common. If His Lordship had thought that this was a defect which would vitiate the suit, he would have exercised his power of giving leave to amend the bill in that respect, and to strike out those persons as Plaintiffs. His Lordship then referred to *Mayor of York* v. *Pilkington* (1 Atk. 282) as shewing that a Plaintiff in such a case had a right to an issue to establish the general rights. The question was not, however, of much importance in this case, as the Plaintiff was clearly entitled to a decree in respect of himself and all other the freehold tenants, each of whom would have to prove his right. Moreover, the rights in this case were of a similar nature, and His Lordship thought that this was not a misjoinder, and that the Plaintiff was entitled to unite all these persons in one suit for the purpose of establishing their commonable rights. His Lordship then expressed his opinion that the Plaintiff had shewn his own title, and that he was not affected by the alleged agreement as to the inclosure, and granted an injunction directing the Defendant to pay the costs of the suit.

(1) 5th Ed. p. 399.
(2) 11 Hare, 266.
(3) 5 D. M. & G. 911.
(4) *Ante*, p. 716.

(1) See ante 716

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that sufficient common was left: *Duberley* v. *Page* (1); *Arlett* v. *Ellis* (2). Even if the holders of land which was formerly part of the manor had now no rights of common, that only amounted to a misjoinder of Plaintiff's, which was no longer a fatal defect, and could only affect the costs. There were at least ten freeholders, and there might be more.

Mr. *Jessel*, in reply.

Aug. 2. LORD HATHERLEY, L.C., said that this case, in many respects, was in the same position as *Warrick* v. *Queen's College, Oxford* (3). There was great confusion on the court rolls, and the courts baron and courts leet had not been kept distinct. But it had been clearly made out that the Plaintiff was the owner of an ancient freehold of this manor, and had commonable rights over the waste, and that these rights had been exercised by the freehold tenants from very ancient times. There was the same difficulty in this case as in *Warrick* v. *Queen's College*, that sometimes the "inhabitants" and the "parishioners" were mentioned; but that was referable to the original prescriptive grant to the freeholders of rights which might afterwards have been exercised by their tenants. A legal title must be assigned if it could be shewn, and it would not be the worse because other persons might have been mixed up with it. There was this difference, that in this case there were also copyholders of the manor. His Lordship then continued:—

As regards the objections to the frame of the suit, I must confess that the bill is framed in a very singular way, and Mr. *Jessel* raised a formidable list of objections to its form. He said, first, that the bill was on behalf of the Plaintiff as a freehold tenant of the manor, and on behalf of other people who were in an entirely different condition, that is to say, simple freehold tenants of what was formerly part of the manor, who were, therefore, by no means necessarily prescriptive tenants; and that the bill did not define who were the tenants, or what was the class of people, or on whose behalf the Plaintiff sued, but left them, in fact, to be afterwards

(1) 2 T. R. 391. (2) 9 B. & C. 671, 678. (3) *Ante*, p. 716.

ascertained by the direction of the Court. Next, Mr. *Jessel* contended that there were copyholders who certainly had some interest in the waste, but were not made parties or even mentioned. Thirdly, that the Plaintiff had averred that there were other people, such as "inhabitants," who had rights, and that these rights were attempted to be proved. Then his fourth objection was, that, in fact, there were only ten freeholders proved to hold of the manor. Then it was said that there were other freeholders with different sorts of rights, but still rights of common by grant within the time of legal memory, that is, by ordinary modern deed. It was further objected that there were also some freeholders who acquiesced in all that had been done, and were bound by an alleged agreement. Finally, an objection was founded on the absence of any allegation or proof that the lord had inclosed so as to exclude the commoners from their rights by not leaving sufficient common to allow of their being exercised.

As regards the frame of the suit, the objections are formidable, and I am bound to say that I never saw a suit so framed as this is. But unless by the fixed rules, and by the course and practice of this Court, I am absolutely precluded from acting in this suit, I should attempt to decide upon the present pleadings, for it would clearly be a lamentable thing, when an expensive litigation of this kind had been carried on so far, to turn the Plaintiff round upon a mere point of form and say, "The result of all this must be, that the bill shall be dismissed upon the present occasion, but without prejudice to the Plaintiff recommencing in a more correct way, as he appears to have some rights."

I do not think it necessary to come to that conclusion. Under the new regulations with respect to pleadings, I think we have really arrived at the point at which, in administering justice, we ought to arrive, namely, that every case brought before the Court should be determined upon its merits, and that a plaintiff should not be allowed to go away with a barren declaration that the form in which he instituted his suit was incorrect, and that all the expense incurred by him was therefore thrown away.

It appears to me that the view taken by the Master of the Rolls in this case may be supported. His view was, that the Plaintiff was suing on behalf of himself and of a number of other persons

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who had no rights in the matter; but that that was after all no more than a misjoinder of Plaintiffs, and that exactly the same objection would lie in every case of misjoinder. Certain persons may sue as Plaintiffs, but it may be that there is nothing stated about them in the bill; and it is shewn to be a mere mistake. Suppose *A.* and *B.* joined in a bill in which it was averred that *A.* and *B.* were interested, and it turned out that *A.* had the whole interest and *B.* had none. In that case can you say that there was anything else than a misjoinder? It was formerly held that a receiver could not be joined as co-plaintiff in a suit, and if he was joined as a plaintiff the bill might have been dismissed at the hearing; but happily the legislature has interfered, and has said that no such bill shall be dismissed at the hearing, but that the Court shall make a decree which can be sustained by the person who has an interest. Nor would it make any difference whether the Plaintiff has or has not averred that the receiver had an interest. Averring it is of no use unless it is shewn that he has an interest. What has happened in the present case is, that this Plaintiff has joined certain people with himself, and suing on their behalf he has averred that they have an interest. It turns out that they have none, but that he has. In that state of things the Master of the Rolls was quite right in saying that he might have ordered the bill to be amended at the hearing, subject to any question with regard to the expense which had been incurred by adding persons as Plaintiffs who ought not to have been added.

Mr. *Jessel* drew a distinction, contending that this was a bill of peace, and was filed in order to quiet the title, which could not be done, as no decree was made for or against these other persons whose rights were therefore not barred in this suit, although they might hereafter be barred in another suit. But I do not think that that in reality amounts to anything, because the same might be said in every case of misjoinder. Of course the other Plaintiffs might hereafter, by a better title than has been here made out, shew that they have a right, and proceed to bring their own suit. Here the Court is of opinion upon the evidence, that the right of the freeholders is made out, though it is also of opinion that no title is made on the part of some of the Plaintiffs.

Undoubtedly I feel pressed with the difficulty; but I do not

feel so pressed as to be obliged to say that a freeholder coming into this Court, and bringing with himself other persons, can be turned round upon a mere point of form because he has alleged that he, as a freeholder, has certain rights, and that the other persons whom he has joined with him, have also those rights; whereas it turns out that although he has these rights, the other persons whom he has joined with him have no such rights.

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The alleged defect, as to the copyholders not being before the Court, I think only arises from the obscurity of the evidence. It does appear that there are other persons besides the Plaintiff who have claimed to exercise, and have exercised, to a certain extent, rights. As regards the inhabitants, from anything that appears on the court rolls, those rights, such as they were, were exercised simply by the freeholders allowing a concurrence or joining of the rights of other persons with their own without taking any steps to prevent it; thereby subjecting themselves to the difficulty of having their rights mixed up with the rights of others, but without depriving themselves of their own rights. It appears, however, that the copyholders have rights over this waste together with the freeholders; but I apprehend that when a person comes here to assert a common right for himself and others against another person who is a wrong-doer, he is not obliged to bring all who have similar rights, perhaps under a different title, to join with him in such a suit; although he may, if he pleases, so join them. I apprehend that it would be perfectly consistent with the proper framing of the suit if these copyholders had been joined, supposing always that their rights were exactly coextensive with those of the freeholder. In other words, the copyholders might, by custom, be entitled to that to which the freeholders are entitled by prescription, and if the rights are identical I think both classes might well join in a suit against the lord if he should attempt to exclude them. It does not follow that the freeholders are obliged to join the copyholders, because they may have a particular right of their own, and the freeholders can sustain their suit against the lord, who is not the less their common enemy, though he may be the common enemy of the copyholders also. I take it, that a wrong-doer has no right to say that if he is injuring a certain class of persons claiming under a right, and is at the same time

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injuring another class of persons claiming exactly the same thing under a different right, then neither class shall sue him without joining the other class. Suppose that an ordinary landlord had granted certain rights to several persons, then, if he attempted to destroy or interfere with the rights of the whole body, this Court would allow those persons to join in bringing their suit for the purpose of protecting their rights; but supposing he had also granted to other persons rights subordinate to those which he had previously granted, and by the same act of wrong-doing interfered with the exercise of those rights to which both parties were entitled; then I apprehend that both sets of grantees might join together and redress the common grievance by filing a common bill, or if they pleased, each class might sue separately. It is just like the case of several classes of shareholders, who may all have common rights against a fraudulent director, but who may be differently affected by the violation of their rights. Each one of the shareholders might file his bill to obtain redress in respect of the violation of his rights, or the whole might concur in a common suit against the wrong-doer.

It seems to me, upon the same grounds as those which I have stated in *Warrick* v. *Queen's College* (1), that the freeholder in this case has made out his title to particular rights of common, as testified by the rolls and the other evidence in the suit. But he has asserted certain rights on behalf of other persons who are not freeholders of the manor, and who have not shewn any title to exercise those rights. I think that I can treat them as persons who have been improperly joined as parties with the Plaintiff in the suit.

Then, as regards the copyholders; a copyholder may have, and probably has, in most, if not in all, cases, the same rights as the freeholders have; but it is not necessary to embarrass ourselves with the rights of the copyholders, because this is a bill asking nothing against them, nor in any way interfering with their position. If the bill of the freeholders were dismissed the copyholders would be none the worse; they would be just in the same position as before in respect of the waste. The copyholders may or may not share with the freeholder some of his rights, but that

(1) *Ante*, p. 716.

does not affect him, except of course that he may have a diminished quantity of common if they establish their rights. He has not the less a right to say that he represents one class, who, under a common title, have a common right against the Defendant as a wrong-doer..

I have dwelt upon this part of the case at some length, because I confess I felt pressed with Mr. *Jessel's* very well-put objections to the form which the suit has assumed. I think the form has been extremely inconvenient, but, in substance, that has not led to any material difficulty in deciding upon the case or in dealing with the evidence. No doubt the evidence of the court rolls, and other evidence, have had to be sifted in order to see in whom the right was; but there is a title which the Court can find and support, and it is a case in which the suit can be sustained, though persons not necessary parties have been joined as Plaintiffs.

His Lordship then commented on the evidence, and said that the lord had purchased the manor for a comparatively small sum, and if he had succeeded in depriving the freeholders of all rights would have made a very handsome profit; and he seemed to have considered that, being the lord, his title would not without difficulty be displaced. In that speculation he had been disappointed. His Lordship then commented on the attempt at an arrangement which had been made, coming to the conclusion that no binding agreement had been effected. As to the argument that there was still enough waste left, the onus of proof was on the lord; and even in cases where a very large extent of common has been left, the lord must prove that he has left enough.

His Lordship made a small variation in the decree as to digging gravel, affirming the decree in other respects, except as to the costs, giving no costs of the suit, because the Defendant had been put to unnecessary expense and vexation; and no costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Gadsden & Treherne.*
Solicitor for the Defendant: Mr. *H. P. Bird.*

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JEGON *v.* VIVIAN.

Mining Lease—Instroke—Trespass—Damages—Value of Coal—Barrier—Passage of Air and Water—Way-leave—Continuous Working.

A tenant for life, with certain powers of leasing, demised the seams and veins of coal under a piece of land for twenty-one years, and for sixty years if the tenant for life had power so to do; with liberty for the lessee to search for, dig, raise, and sell the coal, and to make any pits or works, and to take surface land, paying for the damage; and the lessee covenanted to work the mines in a proper and workmanlike manner, and to deliver up at the end of the term the works, seams, and veins of coal in good repair and condition, so that the said coal works might be continued. The lessees worked the demised coal by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, and did not sink a pit so as to work the demised coal from the deep.

They kept no barrier between the two collieries, so that water and air passed from their other colliery through the demised colliery into a lower colliery.

They also continued to work the demised coal after the expiration of the lease for twenty-one years, claiming to be entitled for sixty years; which claim was, after much litigation, decided to be invalid as against the reversioner:—

Held, that, under the circumstances, working by instroke was working in a proper and workmanlike manner, and that the lessees were not bound to sink a separate pit for the demised coal:

That the value of the coal raised by the lessees, after the expiration of the twenty-one years' lease, was to be paid for by them at its fair market value, as if they were purchasers, all expenses of hewing and raising being allowed:

That, under the terms of the lease, the lessees were not liable to damages for not working the coal continuously:

That the lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for way-leave or air-leave:

That the lessees were liable for any damage done beyond the removal of coal by working the mine since the determination of the twenty-one years' lease, and must also pay for way-leave or for the passage of coal through the lessor's mine since the determination of the lease.

Decree of the Master of the Rolls affirmed, with variations.

L. G. GWYN, who died in 1798, by his will devised the residue of his real estates, which included the *Cadley* estate, in the county of *Glamorgan*, unto his daughter *Catherine M. Gwyn* for her life, without impeachment of waste, otherwise than that by his will mentioned, with remainder to trustees, with remainder to the sons

and daughters of his daughter and their issue in tail; and in default of such issue to several persons named in the will as the daughter should by will appoint; and in default of such appointment, to the testator's nephew *Thomas Powell* and the heirs of his body. And the testator empowered his daughter, and all other persons who might be seised of the estates, to grant leases thereof for the term of twenty-one years and no more, taking and reserving therein the best rent that could be reasonably gotten for the same, and so that such leases should commence in possession and not in reversion, and so that the tenants be restricted from waste and from assigning without consent, and also that a special reservation might be made in every such lease empowering the successive tenants for life and their assigns to dig and take away coal, iron ore, and other minerals, and to cut down wood. And the testator further directed that it should be lawful for his said daughter to work or contract for, lease, or set out to be worked, all coal, iron ore, and minerals under the said estates, and that all the issues and net proceeds, and profits thereof, should be paid by his said daughter to the trustees of the will, and be by them applied in payment of debts or in the purchase of land as therein mentioned.

In 1828, *Catherine M. Gwyn*, the daughter of the testator, married the Count *de Wuits*.

On the 2nd of May, 1840, the Count and Countess *de Wuits* executed an indenture of lease, whereby, in execution of the powers given her by the will of her father, and of all other powers, the Countess *de Wuits* appointed and demised, and the Count *de Wuits* confirmed, unto *Joseph Martin* all the mines and beds of coal under three farms which formed the *Cadley* estate, with full power for *Martin*, his executors, administrators, and assigns, to open, search, dig, delve, bore, raise, and use all lawful means whatsoever for the finding and discovering of all or any mines and minerals of coal and culm not already known under the said farms, and to use and work the same, as well as the mines, veins, and seams of coal already known, and to raise and land "all the coal and culm which shall be found therein respectively, and for his and their own use and benefit, to take, carry away, and dispose of all the coal and culm so to be raised and landed, and also free liberty, power, and authority to and for the said *Joseph Martin*, his

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executors, administrators, and assigns, and his and their agents, colliers, workmen, labourers, and servants, and others lawfully authorized to dig, sink, drive, run, and make any pits, shafts, levels, soughs, sluices, watercourses, railroads, and other roads, works, and contrivances in, over, under, or upon the said several farms and lands hereinbefore described, and to maintain and use the same. And also the free liberty, license, power, and authority to have and use a sufficient part of the said several farms and lands for laying and placing the coal and culm so to be raised and landed in the course of working the said mines, veins, and seams of coal and culm hereby demised, and for laying and placing any other coal and culm, and also to erect, build, set up, and maintain on any convenient part or parts of the same several farms and lands, any engines, erections, and machines for the better and more effectually working the said mines, or any other mines. And also such houses, hovels, and other buildings as may be found necessary or expedient for the use and accommodation of colliers, workmen, and labourers, and for the standing and placing of the horses, carriages, implements and utensils which shall be found or deemed necessary, or be used in or about the working of the said mines, veins, and seams of coal and culm hereby demised, or of or belonging to any other person. And also the like full and free liberty, power, and authority for that purpose to raise, dig, take, carry, and use all or any of such coal and culm as may be in or upon the said several farms and lands, or any part thereof, and also to use, sell, and dispose thereof, for the benefit of him the said *Joseph Martin*, his executors, administrators, and assigns. And also to bring, lay, and place on the same several farms and lands all such timber, wood, iron, stone, brick, lime, and other materials as he the said *Joseph Martin*, his executors, administrators, and assigns, or his or their agents, servants, or workmen, shall or may want or have occasion to use or require in or about the erecting, building, or repairing of such engines, erections, and buildings as aforesaid, and also to do all and every such other acts, matters, and things whatsoever in, under, or upon the said several farms and lands, or any part thereof, as shall or may be deemed necessary or expedient in or about, or for the pursuing or working of the said mines, veins, and seams of coal and culm hereby demised, or of or

belonging to any other person, and raising and landing the same thereupon, and taking, converting, using, carrying away, and disposing of the same to and for the proper use and benefit of him the said *Joseph Martin*, his executors, administrators, and assigns. And likewise full and free ingress, egress, and regress to and for the said *Joseph Martin*, his executors, administrators, and assigns, his and their agents, labourers, servants, and workmen, customers and dealers in and upon the said several farms and lands, with horses, carts, and other carriages, to and for the getting, taking, and carrying away the said coal and culm, or of or belonging to any other person as aforesaid, making such reasonable satisfaction as hereinafter mentioned to the tenants or occupiers for the time being for the same several farms and lands for such trespass or damage as shall be occasioned therein respectively by reason of the liberties and privileges hereby granted, and using and pursuing the same respectively. To have and to hold, use, exercise, and enjoy the said mines, veins, and seams of coal and culm, and all and singular the liberties, licenses, powers, and authorities, and premises hereinbefore expressed and intended to be hereby appointed, granted, and demised unto the said *Joseph Martin*, his executors, administrators, and assigns, from the 25th day of March last, for and during and unto the full end and term of twenty-one years (and if the said *Catherine M. Gwyn*, Countess *de Wuits*, has power or authority to appoint or demise the same by the said power of leasing contained in the said will of the said *L. B. Gwyn* for the term of sixty years, to be commenced or be computed from the said 25th day of March last). And to have and to hold, use and enjoy, all and every the coal and culm that shall be found, gotten, or raised during the said term of twenty-one years (or the said term of sixty years, as the case may be) in or under all or any part of the said several farms and lands unto and by the said *Joseph Martin*, his executors, administrators, and assigns, to his and their own use and benefit, and as and for his and their own proper goods and chattels, yielding and paying therefor, yearly and every year during the said term hereby appointed, the clear and net rent or sum of £40 of lawful British money, by equal half-yearly payments, on the days and times and in manner hereinafter mentioned. And also yielding and paying during the said term hereby

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appointed the following rents and royalties (that is to say) the rent or royalty of 4*s.* of like lawful money for each and every wey of coal and culm over and above and beyond the first two hundred weys to be raised."

The indenture contained covenants by *Martin* for payment of the rent, the royalties, and the rates and taxes, "and also that he the said *Joseph Martin*, his executors, administrators, and assigns, shall work and carry on the said mines, veins, and seams of coal and culm thereby demised in a proper and workmanlike manner;" and for payment to the occupiers of the three farms of satisfaction for the trespass or actual damage done by working the mines aforesaid, or carrying the produce away, or carrying any materials, or done in any other manner by means of the premises or of the liberties or privileges incident thereto. Provision was also made as to compensation for land taken by the lessees. The lessees were bound to keep accounts. The lessees might, by twelve months' notice, determine the lease, and might at all times during the term remove from the several farms, lands, and grounds any machinery, railways, or works which they had erected or laid down in, under, or upon any part of the estate. Also, the lessees might use any water flowing in, under, or over the said estate, and convey and divert any other water from other lands in, under, or over the same, rendering therefore satisfaction for any damage; and make, maintain, and use as well such railways, roads, and watercourses in, under, and through, upon, or over the farms and lands demised as the lessees should think necessary for carrying the coal and culm which should be raised out of the seams and veins demised. And *Joseph Martin* further covenanted "that he, the said *Joseph Martin*, his executors, administrators, and assigns, shall, at the end, expiration, or other sooner determination of the term hereby appointed or granted, peaceably and quietly surrender and yield up unto the said *C. M. G.*, Countess *de Wuits*, or her assigns, or to such person or persons so for the time being entitled or actually possessed of the said estate expectant as aforesaid, or to whomsoever the said *C. M. G.*, Countess *de Wuits*, or her assigns, or such other person or persons may direct, all and singular the coal works and mines, seams and veins of coal and culm, quarries of stone and other the premises hereby appointed and granted, and

all the pillars made or left for supporting the ground, and also all pits and shafts which shall be then open, adits, levels, drains, and watercourses, and all roads and ways in upon or under the same lands or grounds, or any part thereof (save and except the engines, machinery, tramroads, railroads, and ironwork and woodwork of every description hereinbefore mentioned), in good repair, order, and condition, so as that the said coal works may be continued, and the pillars worked and raised by the said *C. M. G.*, Countess *de Wuits*, or her assigns, or such other person or persons as aforesaid, in case she or they shall think proper so to do, and shall and will in case the said Countess *de Wuits* or her assigns, or such other person or persons as aforesaid, shall by any writing under her, his, or their hand or hands request the same (but not otherwise), fill up and level all and every and such and so many of the said pits or shafts as she, he, or they may be required to fill up, level, and restore the said lands and hereditaments into a state proper for cultivation as far as circumstances will permit." And the lease contained many other provisions as to working the coal.

The Countess *de Wuits* died in December, 1840, without issue, and without having executed the power of appointment given her by the will, whereupon *T. G. L. C. Powell*, a grandson of *Thomas Powell*, became entitled to the *Cadley* estate as tenant in tail under the will of *L. B. Gwyn*, and took the name of *Gwyn*. *T. G. L. C. Gwyn* barred the entail, and in 1855 agreed to sell to the Plaintiff *Henry Ernest* all the rents, royalties, and money due under the lease of 1840 up to the 2nd of August, 1856. In 1855 *T. G. L. C. Gwyn* sold the *Cadley* estate, subject to the last-mentioned agreement, to one *Edgar*, whose devisees sold it to *Henry Ernest*, who thus became possessed of the whole estate. *Henry Ernest* afterwards mortgaged the estate to the other Plaintiff, *Trew Jegon*.

Martin, soon after the date of the lease, assigned it to a company called the *Swansea Coal Company*, and by various assignments the interest of *Martin* and of the *Swansea Coal Company* became vested in the Defendants *H. H. Vivian* and *J. V. Williams*.

On the 31st of December, 1860, *Henry Ernest* filed a bill against *Vivian*, *Williams*, and others, alleging that the lease of the 2nd of May, 1840, was obtained from the Countess *de Wuits* by fraud,

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and also that it was invalid at law beyond her life estate, and praying an account and payment for the coal and minerals taken by the Defendants, and for damage done by working the mines improperly, and that possession might be delivered to the Plaintiff. This suit of *Ernest* v. *Vivian* was heard before the Vice-Chancellor *Kindersley*, who, on the 22nd of December, 1863, dismissed the bill with costs on the ground of the Plaintiff's laches or acquiescence, and without prejudice to any right at law or to any bill he might file admitting the validity of the lease (1).

The term of twenty-one years granted by the lease of 1840 expired on the 24th of March, 1861. *Ernest* gave frequent notices to the Defendants that they were trespassers, and on the 14th of February, 1865, the Plaintiff in this suit brought an action of ejectment in the Court of Common Pleas, in the name of *Jegon*, against *Vivian* for the recovery of the mines and hereditaments demised by the lease, the question being whether the demise for sixty years was valid.

The action was tried at *Swansea*, when a verdict was entered for the Defendant, with leave to move to enter a verdict for the Plaintiff. The Court of Common Pleas was moved accordingly and a rule granted, which was argued and discharged on the 25th of November, 1865, as reported (2). A case was then stated by way of appeal, and on the 6th of February, 1867, the Court of Exchequer Chamber directed that the rule should be made absolute and a verdict entered for the Plaintiff, which was accordingly done (3). The Defendant appealed to the House of Lords, who, on the 29th of June, 1868, dismissed the appeal (4).

Before the appeal to the House of Lords was decided, the Plaintiffs had filed the bill in this suit (last amended on the 1st of May, 1868) stating as above stated, and admitting for the purposes of this suit that the lease of 1840 was in equity a valid demise for the term of twenty-one years; and claiming damages and an injunction under the circumstances before and hereinafter stated.

The *Cadley* estate is of about 289 acres. The *Swansea Coal Company* had, at the date of the lease, obtained agreements for leases of adjoining collieries, called *Mynydd Newydd* and *Panty-*

(1) 33 L. J. (Ch.) 513.
(2) Law Rep. 1 C. P. 9.
(3) Law Rep. 2 C. P. 422.
(4) Law Rep. 3 H. L. 285.

maes, and the Plaintiffs alleged, but the Defendants denied, that *Martin* took the lease of the *Cadley* estate for the purpose of assigning it to the *Swansea Coal Company*. That part of the *Cadley* estate which contained the more valuable minerals abutted towards the south upon the *Mynydd Newydd* colliery, in which the *Swansea Coal Company*, in or about the year 1843, sank a pair of shafts or pumping and winding pits, and on which they constructed a railway and other works for the conveyance of coal. The dip of the coal-measures under the *Cadley* estate was to the deep of or slopes down from the coal in the *Mynydd Newydd* colliery, so that the water from that colliery flowed through the ways and channels cut by the lessees into the *Cadley* estate, and, as the Plaintiffs alleged, would, if not drawn off and pumped up, drown the mines therein; but the Defendants maintained that it merely flowed through the *Cadley* estate into another colliery belonging to the Defendants, and was pumped back again and returned to the *Mynydd Newydd* pit. The *Swansea Coal Company* worked the coal under the *Cadley* estate by means of a slant driven from the *Mynydd Newydd* pit, and took large quantities of coal therefrom. The Plaintiffs contended that this mode of working was improper, and that pits and shafts ought to have been sunk upon the *Cadley* estate so as to drain and ventilate independently of the adjoining colliery, in which case proper barriers would have been kept to prevent the workings on the *Cadley* estate from being flooded by water from the collieries to the rise of that estate, and from being rendered dangerous by gases produced in the adjoining collieries. And the Plaintiffs stated that some of the workings in the *Cadley* estate had in consequence been drowned out and abandoned, as to which, however, there was a dispute. The Defendants contended that the coal on the *Cadley* estate was of small value, and could only be worked to advantage from another colliery, and that the cost of a shaft would be £27,000 at least. On these points much evidence was entered into, the effect of which is stated in the judgment of the Lord Chancellor.

The Plaintiff further raised a question whether the £40 dead rent was to be allowed for in the payment of the royalties. They also claimed damages, because the Defendants had not worked the coal continuously, and had not raised so much as they might

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have raised. The Defendants admitted that from 1844 to 1847 they did not work the coal on the *Cadley* estate, and did not contend that they had raised all the coal they might have raised.

The Plaintiffs also claimed the value of the coal raised since the determination of the lease, allowing for the cost of haulage, but not for the cost of getting and hewing.

The Defendants had worked some coal in estates called *Pantymaes* and *Blaenymaes* by means of headings driven through the *Cadley* estate into the *Mynydd Newydd* pit, and had carried the coal and ventilated their pits through the *Cadley* estate; and the Plaintiffs further claimed payment as for wayleaves and royalties on this account.

The Plaintiffs further claimed damages from the Defendants for breaking the barrier between the mines, and asked for an injunction to restrain the Defendants from allowing the mines to remain so as to be flooded, and from using the mines for the drainage and ventilation of other mines. The Defendants said that the barriers had been broken by those who were working the *Cadley* colliery before the *Swansea Coal Company* came into existence, and that when the *Cadley* coal was worked, the water would have made its way from the adjoining mines to the rise. They admitted that they did not preserve barriers between the mines under the *Cadley* estate and the *Mynydd Newydd* colliery, and said that they were under no obligation to do so.

The Master of the Rolls, before whom the cause was heard, was of opinion that, as to the coal raised since the expiration of the lease for twenty-one years, the Defendants must be treated as having taken it by mistake; that the Defendants were not obliged to sink a pit, and had worked the mine in a proper and workmanlike manner; that they were entitled to use the passages through the *Cadley* estate during the lease; that they were not bound to work more coal than they had worked. And his Lordship directed: 1. An account of what was due for royalties under the lease; 2. An account of all coal and minerals got from the mines since the expiration of the lease, and of the value thereof, the Defendants being charged only with the fair value of such coals and minerals at a fair rate as if the mines had been purchased from the Plaintiffs; 3. An account of what was to be paid for the pas-

sage of coal through the estate since the 25th of March, 1861. That part of the bill which prayed an account of the damage done by working the mines in an improper manner, and by not leaving barriers, and by not sinking proper shafts, was dismissed, and no costs were given.

From this decree the Plaintiffs appealed. They asked—first, an injunction to restrain the Defendants from draining or ventilating through the Plaintiffs' mine; secondly, £40 a year as an absolute rent; thirdly, damages for not sinking the pit, and for not keeping up the barriers; fourthly, that the coal taken might be valued, allowing for haulage to the pit's mouth, but not for hewing or other expenses; and fifthly, damages for not working the pit continuously.

Mr. *Jessel*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Jackson*, for the Plaintiffs:—

These lessees ought not to drain or ventilate through our mine. They have destroyed the barrier between the pits, and in so doing have destroyed much coal, and allowed the water and air from their own pit to run through ours. If they had worked this coal from an independent pit, we should have had the royalty, but now the coal is wasted: *Beaufort* v. *Morris* (1); *Hunt* v. *Peake* (2). They ought to restore the barrier, or in some way prevent the water and air from running into or through our pit.

We also claim to be paid for the passage of the coal from other pits through our land, both during the lease and afterwards. In fact, the lessees have used the *Cadley* estate, not as a coalpit, but as a means of working their own coalpits.

We say that the lessee ought to have sunk an independent pit on our land, and not to have worked this coal by instroke from his own pit. The consequence of his not doing so is, that we are not able to go on working, and that the covenants have not been complied with. The Master of the Rolls was guided by *Lewis* v. *Fothergill* (3), but each lease must be construed on its own terms. This lease clearly contemplates that an independent pit will be sunk. At the time when this lease was granted the lessees had not the adjoining

(1) 14 Jur. 607. (2) Joh. 705.
(3) Law Rep. 5 Ch. 103.

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colliery, and therefore neither party could have contemplated working the coal from the adjoining colliery. Moreover, they are bound to yield up the estate, so that the working can be carried on, but how can that be done without a pit? As things have happened, we have no access whatever to the workings on our own estate, even to view them, without the leave of the Defendants. It is admitted that, in order to work our own coal, we must sink a pit and build barriers to keep out the water from their pit. The only proper way of working coal is to work from the deep, else the mine is in continual danger, and, besides, much coal is wasted. No doubt, if *Cadley* pit and *Mynydd Newydd* pit had all belonged to the same person, it might have answered his purpose to lose some coal and to suffer the inconvenience of working from the rise; but here the *Cadley* coal belongs to the Plaintiffs, and they are injured, though the Defendants may have gained by it. This explains the conflict of evidence on the subject of these workings. But the lessees were bound to work the *Cadley* coal properly. There is an implied contract to that effect: *Wood* v. *Copper Miners Company* (1); *Stanley* v. *Agnew* (2); *Powley* v. *Walker* (3). The lessees have power by the lease to sink pits, make railways, take lands, and other things, which shew clearly that a pit was intended.

As to the amount to be allowed for the coal, we are willing to allow for haulage and raising, but not for hewing or anything else. The Plaintiffs are entitled to be placed in the same position as they were when these coals were severed and became chattels: *Martin* v. *Porter* (4); *Morgan* v. *Powell* (5). *Wood* v. *Morewood* (6) is merely a *nisi prius* decision. Moreover, here the Defendants had distinct notice of our claim, and wilfully continued as trespassers: *Wild* v. *Holt* (7); *Llynvi Company* v. *Brogden* (8). If they had had no notice of our title, they might perhaps be not dealt with so strictly: *Hilton* v. *Woods* (9). We say that the Defendants ought to be compelled to rebuild the barrier, so that air and water shall not be allowed to run into our pit; otherwise, they are not working properly. They have no right to damage our colliery in this way.

(1) 7 C. B. 906.
(2) 12 M. & W. 827.
(3) 5 T. R. 373.
(4) 5 M. & W. 351.
(5) 3 Q. B. 278.
(6) Ibid. 440, n.
(7) 9 M. & W. 672.
(8) Law Rep. 11 Eq. 188.
(9) Law Rep. 4 Eq. 432.

We also say that the covenant to work in a proper and workmanlike manner must mean an absolute covenant to work, and that if the coal has not been sufficiently worked, the Plaintiffs are entitled to damages: *Sharp* v. *Wright* (1). It is absurd to suppose that the lessor intended to give up his mines for twenty-one, or perhaps sixty years, with the expectation of receiving £40 a year only. We say that they never really and properly worked the *Cadley* coal, but only used the *Cadley* estate for the purposes of the adjoining collieries. They have gotten but little coal, and have injured the estate: *Foley* v. *Addenbrooke* (2).

At the conclusion of the argument for the Appellants, the Lord Chancellor expressed his opinion that the Defendants were not bound to work continuously.

Sir *Roundell Palmer*, Q.C., Mr. *Southgate*, Q.C., and Mr. *Speed*, for the Defendants:—

As to keeping up the barriers, the law is settled by *Smith* v. *Kenrick* (3).

As to the amount to be paid for the coal gotten since the expiration of the lease, the rule in equity is different from that at law. The lessees honestly believed that the lessors had power to grant the lease, and carried the matter up to the House of Lords. Some of the Judges of the Court of Common Pleas thought the lease good. The Defendants acted fairly and honestly, and must be treated accordingly. At law the action is simply for the conversion of the chattel, and the expense cannot be taken into account; but even at law the expense of carrying is allowed. Here the technical rule of trover does not apply. We admit that we have taken away the coal, and that the Plaintiffs are entitled to the value of it in the ground; on any other principle they get the value *plus* our labour. As to the separate pit, if there was any doubt, it has been removed by the decision in *Lewis* v. *Fothergill* (4).

Mr. *Jessel*, in reply:—

Here the lessees had not the adjoining collieries at the time when the lease was granted, and there is no reason to think that

(1) 28 Beav. 150.
(2) 13 M. & W. 174.
(3) 7 C. B. 515; 13 Jur. 363.
(4) Law Rep. 5 Ch. 103.

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the lessors expected them not to sink a pit. The natural construction of the lease is that a pit would be sunk. It is admitted that working by instroke is injurious; and if that had been intended, a distinct provision would have been made for it in the lease. The whole tenor of the lease is the other way. As to the barriers, the Defendants have no right to send their water through our land, even though, as they say, it is pumped back.

LORD HATHERLEY, L.C.:—

One main question in this case is, whether the Defendants were by the terms of the lease bound to sink a pit on the *Cadley* estate, so that when the reversioners, who are represented by the Plaintiffs, came into possession, they should be able to continue working the mines.

The argument with which I have been chiefly pressed in support of the claim made by the Plaintiffs was founded on the provision in the lease that the estate shall, at the expiration of the lease, be delivered up, so that the works may be continued. I think a great part of the fallacy of the argument for amplifying that covenant arises from considering it to mean that which might possibly have been anticipated, on the part of the lessors as well as on the part of the lessees, when the lease was entered into, as likely to take place; and this was urged before me as an argument to induce the Court to introduce an implied covenant, which the parties nowhere expressed, because it was said that, unless an implied covenant were introduced, that intention which was present to the minds of both parties could not be carried into effect.

Now, the first observation that arises with reference to this clause, which is very often to be found in leases of this description, is, that this lease must have been prepared and entered into with due consideration. I am bound to consider that each party understood what suited his own purpose best in entering into such a bargain. In some cases a question has arisen as to the effect of the word "intention." That question was raised in the case of *Rigby* v. *Great Western Railway Company* (1). There a doubt arose as to whether the company were bound to stop all their trains at *Swindon*, and the Court of Common Law (2) held that

(1) 10 Jur. 488, 531. (2) 14 M. & W. 811.

the expression of that intention was on the face of it equivalent to a covenant. But it is entirely unnecessary to enter into that question here, for no intention is referred to, and a covenant cannot be implied which the parties have not thought fit anywhere to express. That would, in my opinion, be a monstrous stretch of the doctrine applicable to such cases.

It has further been argued, that giving the lessees power to do certain acts implies a covenant on their part to do them; but that is a complete inversion. The lessee has secured to himself certain advantages, without introducing any corresponding obligation.

The demise is simply of the coal, not of the surface:—[His Lordship then read the demise.] The argument upon that is, that there is the fullest possible power to work the mine, and to take any lawful means of raising the coal, and this, according to the decided authorities, includes the very power of working from other mines if the lessee has them. There is the power of making roads in, over, and under, to carry not only those coals which may be gotten out of this particular mine, but also the coal from other mines. Then there is the power to raise the coal to the surface. Then comes the power of pursuing the veins underground, and of working the veins demised in connection with other veins, for the purpose of pursuing, raising, or bringing the same on the lands demised.

Power is given to dig pits, to bring coal to the surface, to make roads, and carry coal on the surface, because the surface is not demised, and the lessee would be unable to carry his coals over the estate without this power; but I cannot infer from that a negative, and that the lessee is not to work the coal by any other method. If he is owner of the neighbouring mine, he may do what he pleases, and no power was needed in the lease to enable him to do so; but in order to do anything on the surface which belongs to the lessor he must take a power. That power he accordingly takes, and I am asked to infer that he is under an obligation not to use the larger power which is given him by this lease to work by all lawful means. He was able to work the adjoining mine, and he took care to secure to himself powers to carry the coal he raised from that mine, as well as the coal he might raise from the demised mine, over the surface of the *Cadley* estate; but he has entered into no obligation to work by means of that surface only.

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There is nothing else in the lease which appears to concern the sinking of a pit, except the covenant to work the coal in a proper and workmanlike manner. It cannot be said that working from your own mine, if you have power to do it, is not working in a proper and workmanlike manner. No one can say that working by instroke is improper *per se;* and the foundation of much of the evidence on that subject was that an intention must be implied that the mines were not to be worked from the adjoining pit, and were only to be worked from the lessor's estate.

I was much pressed with the clause which provides that the lessee shall give up the pits and other works, so that the coals may be continued to be worked by the lessor. This is said to shew that it is implied throughout the lease that pits shall be sunk, and here I make the same remark which I made at the beginning, that both sides most probably thought that pits would be sunk, but that does not amount in my mind to a covenant to make them. The words are, "All pits and shafts which shall be then open." That implies that they may or may not be open. What was there to prevent the closing of the pits before the expiration of the lease?—and if they are not open at the expiration of the lease, they are to be handed over in that state. Then, further, there is this, that they are to be given up in such a condition as that the works may be continued. Now, how can it possibly be said that the works cannot be continued, when the lessor has got his own surface land, and may, by sinking a pit, go down and work the coal at any time he pleases?

The whole contest is, whether the lessee or the lessor is to pay this sum of £27,000 for a pit. The lessor can sink his pit, and he has a right when he has sunk his pit to find all the works in such a state as will enable him to go on in the same manner as the previous lessees did. Other people may have their means of access, and he may have his means of access. But whatever they do to his property, they are to leave his property so that whenever he takes possession of it he may be able to work and to sink pits for himself, and not find the whole colliery flooded with water and pillars not left, but find it in a proper condition, so that he may go on with the works.

Then it is said that he cannot go on with the working of this

mine if he has first to sink the pit, and that carrying on the works must mean that they are to be carried on just as unremittingly as they were before. I should not be inclined to give much weight to that observation as an inference for importing a covenant of this extremely onerous nature. I find that there is a power to the lessee to remove all the machinery, railroads, tramroads, ironwork, and woodwork; and if that was done, I apprehend that the lessors would have to build an engine and lay down railroads and tramroads, even if the covenant extended to saying that there was to be a pit. However, I think the best answer to that is, that if the parties meant such a covenant they have not expressed it. And if there had been such an obligation in the deed, I apprehend the lessors would not have gone on from the year 1841 down to the present time without attempting to enforce their rights. It ought to have been insisted upon at first, but nothing of the kind has been suggested, and no attempt has been made to force the lessees to work the mines by outstroke instead of instroke; this is a mere afterthought, in order to compel the Defendants to spend £27,000 upon this mine.

Then as to the continuous working: It must be remembered that the subject-matter is a coal mine, and there are various provisions about working coal. An obvious remark upon that would be that where one person is taking a mine and another person is letting a mine, they both think the mine will be worked; and in numerous leases which have come before the Court, there is a covenant on the part of the lessee to work the mines continuously, and there are other provisions of that kind. But when that is intended it is stated. A lessee entering into such a covenant cannot complain if he is unable to fulfil his engagement, but here there is nothing of the sort. It is said, that because the lessee covenants that he will do the work in a workmanlike manner, he has covenanted to be always working. But there are various approved modes of effecting such a purpose. One is to take so heavy a dead rent as to make the lessee find it to his own benefit to work, because the rent must be paid whether he works the mine or not. Another mode is to have an express covenant that he shall continuously work. Another mode is to say that so much coal shall be raised per annum; but to say that this is to be implied

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from a covenant to work in a workmanlike manner would be a very great stretch of the terms actually employed. If the parties meant the lessee to work continuously, they ought to have said so. It is true that there is no dead rent reserved of such an amount as to compel him to work; but I cannot say there is anything on the face of the lease to justify me in saying that this mine was intended to be continuously worked, and I cannot strain the words so far as to say that the lessor has secured it by any covenant or engagement in the lease.

[His Lordship then expressed his opinion as to the mode in which the £40 rent was to be calculated.]

I come now to another question, which is the question of the wayleaves. The Master of the Rolls gave them, and there has been a question raised about the water-leaves and the air-leaves, as they are called. It is said that something should be paid, either in respect of damages, or in the way of rent, in respect of those way-leaves or air-leaves. It must be after the expiration of the lease; there is nothing at all said about any such leaves in the lease. But there is another question raised; and that is, about the damage done; and the argument is put thus: You have had the benefit of water-leaves and air-leaves since the expiration of this lease, and for those privileges you must compensate us, and the damage done to the pit can be best measured in that way. Now, I apprehend, as to all that was done during the lease, there is no question at all. During the continuance of the lease, the lessee had a right to make any conduits he pleased for the conveyance of water over the demised premises. After the lease he would not be bound to put any barrier between his own mine and those mines which were demised to him, in order to prevent the water running by the action of gravitation from his own mine into his neighbour's mine; and there is no doubt the waters would find their way into this channel which he has made, and which it was perfectly lawful for him to make. I do not find he made any channel in his mine during the term of the demise, in order that the water might pass through it. What he did was—he cut drifts and ways; and the only evidence that I have before me on the subject, as far as there is any evidence at all, is, that by the simple force of gravitation the water in these drifts has found its way down. If the Plaintiffs

are so minded, they may stop up those channels, or do anything they please with them. They can prevent their being in any way used; but the Defendants, not being obliged to use them, are not to pay, because those channels, so long as they exist, bring the water down to other mines of the Defendants lying to the deep, whence they pump the water back.

[His Lordship then expressed his opinion that the pumping by the Defendants did not increase the flow of water, and that the passage of air was like that of water.]

If the Plaintiffs are so minded, they can at any time deprive the Defendants of all benefit from the passage of air and water. They can build a wall as a barrier between their mine and the Defendants' mine; but the Defendants are not bound to build any wall at all; they are simply enjoying that which is given them by the mere circumstances of a series of lawful acts which have been done, and which (the lease now being over) the Plaintiffs can put an end to if they like. It gives no right to the Plaintiffs to recover compensation.

On the other points I reserve my judgment.

Jan. 25. LORD HATHERLEY, L.C., said that, under the circumstances of the case, he should not interfere with the decree of the Master of the Rolls as to the costs, and that he thought that as no special damage was shewn to have been caused by the flowing of water through the *Cadley* pit occasioned by improper working during the continuance of the lease, but only such as would occur from the ordinary working, nothing was to be paid on that account. He then said: But I think the question is different as to what may have taken place in the workings since the 25th of March, 1861, because from that time the Defendants were not entitled to work the mine at all. There is some evidence of damage from the mode of working the mine since that time, though not very strong, yet sufficient for me to say that there ought to be an inquiry what is proper to be allowed to the Plaintiffs as compensation for such damage. [His Lordship then gave directions as to

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the £40 rent, and continued:—] Now I approach the question of the allowance to be made for the coal worked wrongfully after the expiration of the lease, the value of which is to be accounted for, subject to deductions—one deduction being, according to all the authorities, for the haulage and bringing the coal from the bottom of the pit up to the pit's mouth. But the question now is, whether or not there is also to be allowed to the Defendants that which the Master of the Rolls has allowed, the cost of winning and getting—that is to say, detaching the coal from the solid rock, and converting it into what is by the authorities held to be a chattel.

I must say that the doctrine of the Courts of Law on this subject does not seem to me, if I may venture to say so, to be in a very satisfactory state. The Courts of Law seem clearly to have decided, in *Martin* v. *Porter* (1), that the hewing was not to be allowed for: on this principle, that the Defendant being a trespasser, and having converted into a chattel that which was part of the freehold, the freeholder or reversioner was entitled to the chattel so converted at the moment it became a chattel; and as it became a chattel at the bottom of the pit, the Courts of Law did not allow for the process which converted it into a chattel, but they did allow for the expense of afterwards bringing it up from the pit, that being the value which they thought to be the measure of the damages to which the Plaintiff was entitled.

A part of the reasoning in that case and in some of the other cases was, that the owner may claim a chattel wherever he finds it. If that were so, he might claim the coal at the top of the pit without making any allowance at all. But that does not seem to be the principle which has been acted upon. Then there was another principle suggested by Mr. Justice *Coleridge* (2), that the proper value was what the owner had lost, which was the value of the thing as it existed unhewn in the pit, because it was in that state when he lost it, and that was what he was deprived of. However, the learned Judge deferred to the decision in *Martin* v. *Porter*, and submitted to that rule. Now it strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any expense for

(1) 5 M. & W. 351. (2) 3 Q. B. 279.

getting and hewing. Suppose the mine worked out, then what he has lost is the coal, but this rule would give him besides all the cost of getting and hewing. It seems a rough-and-ready mode of doing justice, though the remark that a wilful trespasser ought to be punished is worthy of observation; and further, as was said by one of the Judges, when you deprive a man of his property in this way, you deprive him of the management and control of his own property, and he might have made a better bargain. All that, however, is of course speculative, and it seems to me that the Judges have founded their decisions upon the ground of wilful trespass, as in *Martin* v. *Porter* (1), where Mr. Baron *Parke* expresses himself pleased with the rule as laid down. But the same learned Baron, in *Wood* v. *Morewood* (2), held that, where there was a *bonâ fide* claim of title, the trespasser would be allowed for hewing as well as for the other expenses. That was, no doubt, a *nisi prius* decision, but it was adhered to by the learned Judge. I cannot, however, say that this doctrine is very satisfactory; and, no doubt, it is open to Mr. *Jessel's* remark, that we cannot dive into a man's mind and know whether he thinks the title to be good or bad; and I doubt if we can say that the other Judges agreed in all these views.

In that position of the legal authorities I do not feel disposed to introduce in equity a mode of assessing damages according to a stricter rule of damages than that which has been applied at law. This Court never allows a man to make profit by a wrong, but by *Lord Cairns' Act* the Court has the power of assessing damages, and therefore it is fairly argued here that this is a case in which damages ought to be reckoned according to the rule in *Martin* v. *Porter*. Now, no doubt, these Defendants were told over and over again that the Plaintiffs disputed their title, but they held under a lease which professed to give a title if the lessors had power so to do. The working went on on that assumption, *bonâ fide* as it seems to me, and after long litigation the House of Lords held that the lease was not valid, and therefore the Defendants were wrongdoers *ab initio*. [His Lordship then commented on the proceedings in *Ernest* v. *Vivian*, and on the proceedings at law, as shewing that the case of the Defendants was not flimsy, but that they were acting *bonâ fide*.]

(1) 5 M. & W. 351. (2) 3 Q. B. 440, n.

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I think, looking to what has been determined at law, and looking to what the course of this Court was until *Lord Cairns' Act* was passed, I do not feel called upon to give, in the nature of damages, that which in accordance with the decisions would apparently not have been given at law by way of damages. I think that the milder rule of law is certainly that which ought to guide this Court, subject to any case made of a special character which would induce the Court to swerve from it: otherwise, on the one hand, a trespass might be committed with impunity if the rule *in poenam* were not insisted upon; so, on the other hand, persons might stand by and see their coal worked, being spared the expense of winning and getting it.

These Plaintiffs are clearly entitled to be recompensed for any damage done beyond the actual value of the coal in the course of their working, and I ought to observe that there is a good deal of difficulty in knowing how exact justice can be done in such a case, as the prevention of the Plaintiffs from themselves letting their coal is in itself a serious inconvenience and injury; and the only remark I have to make on that point is, that the Plaintiffs have themselves been dilatory in their legal proceedings, though they have given abundance of notices to the Defendants. The Plaintiffs now get the whole value of the coal dug, and the coal not dug remains for them, subject, of course, to the question how far it has been damaged.

His Lordship then said that the variations in the decree did not make any serious difference in the matter of the costs of the suit, as to which he agreed with the Master of the Rolls, the Plaintiffs having been partly right and partly wrong. He gave no costs of the appeal.

MINUTES:—Vary decree of the Master of the Rolls.

Direct an account of what is payable for rent and royalties under the lease, and in taking that account the 4s. per wey, payable after the first 200 weys, be calculated in each year, subject to deduction of the said 200 weys. An account of coal and mineral got from the mines since the 25th of March, 1861, and of the value thereof, the Defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the Defendants at the fair market value of the district. An inquiry as to damages beyond the removal of the coal occasioned by working the mines since the 25th of March, 1861, and what should be allowed as compensation. An inquiry of what ought

to be paid by way of way-leave for the passage of coal through the mines since the 25th of March, 1861. Dismiss so much of the bill as asks for damages for not sinking a pit. No costs of the appeal.

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Solicitor for the Plaintiff: Mr. *J. Lott*, agent for Messrs. *Darvill & Co., Windsor.*

Solicitor for the Defendants: Mr. *W. M. Hacon.*

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L. C. 1871 June 1, 2, 5, 7.

Access of Light—Prescription—2 & 3 Will. 4, c. 71, s. 3—Twenty Years—Unity of Possession—Tenant.

A right to the access and use of light to a house cannot be acquired, under 2 & 3 Will. 4, c. 71, s. 3, by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend.

During such period of unity of occupation, the running of the twenty years under the statute is only suspended.

Semble, the owner in fee of land demised for a term of years is subject to any right to access and use of light over his land which may be acquired by the owner of an adjoining house during the demise.

Decree of *Stuart*, V.C., reversed.

THIS was a suit to restrain the Defendant from building on a piece of land so as to obstruct the access of light to the Plaintiff's house near *Keswick*.

The Plaintiff's house was built in 1803 or 1804, and at the back was a piece of ground used as a garden, which seemed to have been at first waste, or, at all events, not separated from the adjoining field. In or about the year 1817 the house was let to one *Ambrose Turner*, who then became tenant of the garden, as the Defendant contended, or was merely allowed access to it, as the Plaintiff contended. No rent was paid by *Turner* for the garden, the owner, *Slack*, being *Turner's* son-in-law; but the garden was then, as the Defendant contended, separated from the adjoining field, and planted with orchard trees. *Turner* died in 1819, and the house was then let to a Miss *Marshall*, and afterwards to others, all of whom appeared in some way to have had access to the garden; but on what tenure, or in what way, was disputed. In

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1830, a Mr. *Dawson* bought the house, and from that time 10*s.* a year appeared to have been paid by the owners of the house, as tenants from year to year, to the owner of the garden, until 1861, when a lease for ten years at 10*s.* a year was made by the owner of the garden to Miss *Clark*, the then owner of the house. In 1865 the Plaintiff purchased the house from Miss *Clark*; and in 1867 the Defendant purchased the reversion in fee of the garden; and he afterwards purchased the residue of the term of ten years from Miss *Clark*. The Defendant had begun to build on the garden a row of cottages which would obstruct the access of light to the windows of the Plaintiff's house, and the Plaintiff, in June, 1869, filed the bill in this suit against the Defendant, alleging that the lease of the garden was intended to pass to him by the conveyance of the house from Miss *Clark*, and that the Plaintiff had paid the rent of 10*s.* to *Mary Turner*, the owner of the garden, and would have paid it to the Defendant, but the Defendant refused to receive it, or to acknowledge him as tenant, which he ought to be; and alleging that his ancient lights were obstructed, and praying an injunction to restrain the Defendant from erecting any building which would obstruct the free access of light and air to the Plaintiff's ancient lights.

The contention that the lease of the garden passed with the house seemed to have been abandoned by the Plaintiff, who rested his case on the obstruction to his ancient lights. The principal defence to the suit was, that the owners or tenants of the Plaintiff's house had never since 1817 enjoyed any rights adversely to the owners of the garden, but only by permission and as tenants; and this depended on the tenure from 1817, when *Turner* was in possession, to a sufficient time to make up twenty years from 1803, when the house was built. The evidence was very voluminous. The Vice-Chancellor *Stuart* was of opinion, that the owner or tenants of the house were not, in and after 1817, tenants of the garden, and decreed an injunction (1).

The Defendant appealed.

(1) 1870. Dec. 14.

SIR JOHN STUART, V.C.:—

This case is attended with very considerable difficulty, both as to the law and as to the facts. As the Plaintiff's case is now put, he asserts that the light which he seeks to protect by this suit was an ancient light existing

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Fischer*, for the Appellant, contended that, upon the evidence, unity of possession of the house and garden had been proved—at all events,

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before the statute. If it be proved that there was an uninterrupted enjoyment of the light for a period of twenty years and upwards after the time that the house was built, I think the Plaintiff is justified in saying that the light had become an ancient light, and was entitled to protection. The question in this part of the case is a question of fact entirely, because it is asserted on the part of the Defendant that this house was not built until 1804, and that soon after it was built there was a unity of possession of the house and the garden behind it upon which the building now complained of is about to be erected. There is a direct conflict of evidence by many witnesses, but it seems to me that the weight of evidence is in favour of the Plaintiff, and that the Defendant has not proved what, in order to succeed, he must prove, as to the unity of possession, so as to prevent the effect of the lapse of time. [His Honour then stated the effect of the evidence.]

Upon the result of this evidence I can come to no other conclusion than this, that the Defendant has not proved a unity of possession of this house in which these lights are situated with this piece of ground behind it within twenty years after the house was built. If that be so, by the law these lights had become ancient lights, and are entitled to protection. It is said, however, that the decisions in the House of Lords and in the Courts of Law have established a principle which makes it necessary that this should be averred, and, indeed, the statute positively requires an averment of an enjoyment of twenty years of an access of light without interruption for one whole year during the twenty years next before the bill was filed. I am of opinion that that applies to cases within the statute, and that that enactment does not apply, and was not intended to apply, and could not, without the greatest danger, be applied to the cases of lights that had become ancient lights by prescription anterior to the passing of the statute. If that be so, the Plaintiff has established his case.

Then another question has been argued, for which I think there has been no authority cited, and upon which I do not consider it necessary to express an opinion; and that is, whether the owner of the freehold of the dominant tenement can have his right prejudiced by an unity of possession acquired without his concurrence by his tenant. It seems to me, however, to be unnecessary to consider that question, as there are sufficient grounds for me to dispose of this case upon the principle I have stated. But it is evident that this question is a question of very great importance; it is also plain from the course of the decisions that they would go a very great way to prejudice this question. I am content to dispose of the case on the evidence, holding that it has not been proved that there was that unity of possession which would disturb the right of enjoyment during the twenty years next after the house was built. For that reason I think the Plaintiff is entitled to a perpetual injunction.

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after 1817; and in that case no easement could be acquired: *Harbidge* v. *Warwick* (1); *Flight* v. *Thomas* (2).

Mr. *Greene*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Plummer*, for the Plaintiff, contended that there had been no unity of possession until 1830. At all events, there had been no unity of possession for some years after the house was built, and the time which had elapsed since the Plaintiff purchased would make up the twenty years required by 2 & 3 Will. 4, c. 71, s. 3: *Clayton* v. *Corby* (3); *Pye* v. *Mumford* (4). Moreover, the act of the tenant of the house taking the garden (if he did so) ought not to prejudice the freeholder, and suspend his accruing right to the easement. The owner of the garden could at any time have put an end to any tenancy, and have proceeded to obstruct the lights. They also cited *Tapling* v. *Jones* (5).

Mr. *Fischer*, in reply, as to the term of twenty years being made up by the time elapsed since the Plaintiff purchased, said that such a contention would be inconsistent with the bill, which alleged that the Plaintiff was tenant of the garden from the time of his purchase.

LORD HATHERLEY, L.C.:—

In this case the Plaintiff seeks by his bill to restrain the Defendant from obstructing the access of light and air to a house which was built long anterior to the time when the Plaintiff himself became possessed of it, having been built, at the latest, in 1804, and possibly in 1803.

The question turns, first, upon the law of the case; and, secondly, upon the facts as applied to that law. The Vice-Chancellor has determined the case entirely upon the facts, and has thereby been enabled to avoid coming to any decision on the point of law; but, after carefully hearing the case, I cannot help coming to a conclusion as to the facts contrary to that of the Vice-Chancellor.

I think the fact is established that, at least from the year 1819, probably from the year 1817, before the twenty years had elapsed from the building of the house, the ground upon which the Defen-

(1) 3 Ex. 552.
(2) 11 A. & E. 688; 8 Cl. & F. 231.
(3) 2 Q. B. 813.
(4) 11 Q. B. 666.
(5) 11 H. L. C. 290.

dant now proposes to build was occupied by the occupier of the house as tenant from year to year, so that he could not be displaced during any part of his year's enjoyment.

That being so, the question is reduced to a question of law, as to which, no doubt, some degree of difficulty exists, unless *Harbidge* v. *Warwick* (1) is considered as settling the law in cases of this description.

I take the principle of that case, in spite of one expression as to the possibility of interruption, to be, that in order to obtain an easement over land you must not be the possessor of it, for you cannot have the land itself and also an easement over it. [His Lordship then commented on *Harbidge* v. *Warwick*, reading passages from the judgment, and said that the observations made by Baron *Parke* with reference to what would have been the case if it had been necessary on the pleadings to assert a right, seemed, if they were to be taken in their literal meaning, to have been overruled by subsequent cases.] Those observations, however, have not any bearing upon the main question, whether the meaning of the statute 2 & 3 Will. 4, c. 71, s. 3, is that the enjoyment of the easement is to be distinct from the enjoyment of the land itself. The proposition that the enjoyment must be distinct has, I think, never been questioned, and would seem at once to approve itself to common sense and judgment. The statute could not have meant to confer upon a man a right he in no way required to have conferred upon him—namely, a right to enjoy that which he could not be prevented from enjoying so long as he was the occupier of the piece of land on which the impediment to his light might be raised. *Harbidge* v. *Warwick* is a clear case of an owner in fee taking a lease from year to year from the owner of the adjoining land; and then this question might arise—a question which I have previously had occasion to consider—whether, if a man chooses to let his land continuously from year to year, so that he might at the expiration of any year have declined to let it any longer, and have erected buildings so as to obstruct the light—whether in such a case as that he must not take the consequences of his own folly if he does not choose to obstruct the light. That, however, was, in *Harbidge* v. *Warwick*,

(1) 3 Ex. 552.

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held not to be the law. That case went upon this simple ground—that this was an easement like any other easement, and that the law does not allow the co-existence of an easement in land with the possession of the land itself. Undoubtedly, as in the case of all other easements, the accruing right to the easement is suspended, but only suspended, during the union of the possession. So that if it had been shewn that the enjoyment had lasted for fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such a case an enjoyment for twenty years could have been pleaded. The interruption (if such it may be called) by the unity of possession is not an interruption in the sense indicated by the statute, which means an adverse interruption.

It appears to me, that if it be made out that for some six or seven years before the twenty years had elapsed, and before the absolute right had been acquired, the persons who had occupied this house at the same time enjoyed the use of the garden or orchard behind, and if the enjoyment of the light, after the cessation of the unity of possession, has not lasted long enough to make up, together with the previous term of enjoyment, the period of twenty years, then the right is not acquired.

There was one question which the Vice-Chancellor said would be well worthy of consideration if he had not found upon the facts adversely to the Defendant—viz., whether it is competent for the tenant of a freehold house, which has been standing for, say fourteen years, and during that time has enjoyed the access of light and air over the adjoining land, by becoming the occupier of that land, and so uniting the possession, to bar his landlord of the advantage which was in process of maturing towards a right.

It was argued that the tenant could do nothing which could injure his landlord's interest. I think that there is a fallacy in supposing that any interest at all exists, for a man can have no interest enabling him to prevent his neighbour from building on his own land until the statutory time has arrived which gives him a right to prevent his neighbour from building. The Legislature, for the purpose of cutting short litigation, has said, when that state of things has been acquiesced in by an adverse owner

for a period of twenty years, the right, *eo instanti*, must be taken to have accrued. But until the whole period has elapsed, the Legislature gives you no right or title to damnify your neighbour's property by preventing him from doing as he pleases with it. I cannot say that there is anything whatever in the tenant's act in taking the adjacent land which can be said to prejudice the landlord's right, because the landlord had no right of any sort or description anterior to the lapse of the twenty years.

As regards the case of the adverse owner, it has already been decided that upon the words of the statute the adverse owner may be much damnified by the acts of his tenants; but it has been thought, nevertheless, that the advantage of putting an end to litigation must prevail against that disadvantage. Thus, if the owner of the adjoining land has leased his land for a period of twenty years, and the tenant in possession declines to allow him to take any steps by which he can arrest the growing right of his neighbour, then that landlord would be completely debarred of his right, although he had no power of interfering in the matter.

That being, in my opinion, the proper view of the law, it is totally inconsistent with *Harbidge* v. *Warwick* (1) to say that any such easement is or can be acquired until the twenty years have elapsed. And if it appears to me, on the evidence, that there was this unity of possession, then the right had not accrued; and since that time nothing of that kind can be claimed, because on the bill the joint occupation is stated to have continued until a time immediately before the filing of the bill.

We have, then, to look to the question of unity of ownership. As to the onus of proof, I think the Vice-Chancellor quite correct in holding that it lies upon the Defendant. The onus of proof, of course, is upon the Plaintiff in the first instance; and he has shewn that there was a house sixty years old, with windows overlooking the Defendant's land. This being so, he has made out his case till the contrary be shewn. By way of rebutting the inference of law derivable from these facts, the Defendant has undertaken to shew that there has been this unity of possession, and I think that he has discharged that undertaking:—[His Lordship then stated the evidence, and commented upon it.]

(1) 3 Ex. 552.

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I think the Defendant has made out his case upon the facts; and holding, as I do, that the law as applicable to that state of facts would prevent the right from accruing, I am obliged to dismiss the bill with costs; there will be no costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Nethersole & Speechly*, for Messrs. *Hayton & Simpson, Cockermouth.*

Solicitors for the Defendant: Messrs. *Chester & Urquhart*, for Mr. *Waugh, Cockermouth.*

L. C. 1871 *June* 29, 30.

PHILLIPS *v.* HOMFRAY. FOTHERGILL *v.* PHILLIPS.

Vendor and Purchaser—Concealment—Mines—Compensation for Coals wrongfully severed—Compensation for Wayleave.

The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—

Held (affirming the decision of *Stuart*, V.C.), that the Court would not enforce the contract at the suit of the purchasers, though the sale was not shewn to be at an undervalue:

Held (also affirming the decision of *Stuart*, V.C.), in a suit by the landowner, that the landowner was entitled to the value of the coals gotten under his land, with an allowance for raising, but none for getting, and to compensation in the way of wayleave and royalty for all minerals gotten by the Defendants from their own mines and carried under his land.

A. and *B.* being tenants in common, *A.*, without any authority from *B.*, contracted for the sale of the estate. *B.*, on being informed of it, objected, and said the price was too low; but a mortgagee threatening to sell the estate under his power unless this sale proceeded, *B.* allowed the matter to go on, and gave no notice to the purchaser that he dissented; an abstract was delivered, and negotiations as to the title went on for about three years.

Semble, that it was too late for *B.* to object that the agreement was entered into without his authority.

THIS was an appeal by *Rowland Fothergill*, one of several persons carrying on business in partnership under the style of the *Tredegar Iron Company*, from a decree of Vice-Chancellor *Stuart*.

Joseph Phillips and *John Phillips* were the owners of a farm of

116 acres copyhold of the manor of *Abercarne*, in *Monmouthshire*. Their predecessor in title had sold to the *Tredegar Iron Company* fourteen acres, formerly part of the farm, reserving the minerals. It appeared that, according to the custom of this manor, the minerals belonged to the copyholders, subject to certain rights in the lord. The farm was subject to a mortgage for £4800. In 1859 the *Tredegar Iron Company*, whose mineral property surrounded the farm, negotiated, through their then manager, *R. P. Davis*, with the Messrs. *Phillips* for a lease of the coal under the farm to the company at 6*s.* per ton royalty, the minimum rent being £250. The company, upon the commencement of these negotiations, drove headings under the farm from an adjoining colliery for the purpose of testing the coal. About October, 1860, the company refused to take a lease, but, without the knowledge of the owners, went on working under the farm, and extracted from it a considerable quantity of coal. In January, 1863, the farm was put up for sale by auction, but it was bought in. On the 14th of April, 1863, an agreement for sale to the company of the farm and of the minerals under the fourteen acres (subject to the rights of the Lord of the Manor) for £5000 was signed by *James Reed*, the manager of the company, and by *Joseph Phillips*, who was treated by the agreement as sole vendor. At the time when this agreement was entered into the coal taken by the company from under the farm amounted to upwards of 2000 tons, and it was not known to either of the Messrs. *Phillips* that any coal had been got, except the trifling quantity which had been got in the process of testing. The agreement for sale was entered into by *Joseph Phillips* without the authority of *John Phillips*, who, when informed of it, objected, and said that the price was too low; but the solicitors of the mortgagee informed him that if he refused to carry the sale into effect the mortgagee would sell under his power. *John Phillips*, therefore, did not inform the company that he repudiated the sale, but allowed the matter to proceed, though it did not appear that he in any way actively concurred. An abstract was delivered, and considerable difficulties were found in the title, which caused great delay. In July, 1866, the Messrs. *Phillips* received information which led them to believe that the company had been working under the farm. They thereupon applied for leave to inspect the underground workings,

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which was refused. They shortly afterwards instructed two persons, who, on the 16th of May, 1866, succeeded in surreptitiously getting into the mine, and discovered that the workings had been going on. *Joseph* and *John Phillips* accordingly, in September, 1866, filed their bill (*Phillips* v. *Homfray*) for an account of all coal and ironstone gotten by the company under the farm; for an account of all coal and ironstone conveyed from the company's mines through passages under the farm; and of coal and ironstone gotten out of mines of the company which had been drained or ventilated through roads, passages, aircourses, or watercourses under the farm; and that the company might be decreed to pay for the coal and ironstone gotten from under the farm at their values when first severed from the mine, and to pay for all underground wayleave and privileges which they had used under the farm in getting coal and ironstone from their own mines; and that they might be charged with a wayleave rent or royalty in respect of their user of the aircourses, watercourses, and roads under the farm; and be restrained by injunction from using any aircourse, watercourse, or road under the farm. The bill also prayed for an injunction to restrain further working, and for liberty of access to the mines. As regards the agreement for purchase, the original bill simply stated that there had been a negotiation for purchase by the Defendants, but that no binding agreement had been come to. The Defendants, by their answer, set up the agreement for purchase as a binding agreement, upon which the bill was amended by stating more fully the circumstances of the agreement, the non-concurrence of *John Phillips*, and circumstances on which the Plaintiffs relied as shewing that the company had abandoned the purchase some time before the bill was filed.

On the 9th of February, 1867, the company filed their bill (*Fothergill* v. *Phillips*) for specific performance of the agreement. The Messrs. *Phillips*, in their answer, alleged that the agreement was invalid for want of the concurrence of *John Phillips*, and because it was entered into in ignorance of the company having got a large quantity of coal under the farm, and because it was a sale at an undervalue, and entered into in consequence of false representations made by the agent of the company as to the value of the mines. The Lord Chancellor was not satisfied that the undervalue was

proved or that false representations had been made, and these two points need not be further noticed.

The evidence as to the state of the underground workings was not complete and satisfactory, but it led to the conclusion that the company had carried coal to some extent from mines of their own through underground workings under the farm, and that water from the company's mines had run into the mines under the farm; but there was nothing to shew that any steps had been taken for the purpose of draining the company's mines through the mines under the farm—the flow of water, so far as appeared, being only the natural flow from an upper mine to a lower when the barrier is broken through. It further appeared that air-shafts not reaching to the surface had been made under the farm from one bed to another; but it did not appear that they had been made with any other object than that of ventilating the works carried on for the purpose of getting coal under the farm. That a considerable quantity of coal had been got under the farm at the date of the agreement was admitted.

The cause came on to be heard before Vice-Chancellor *Stuart*, and His Honour (1) made a decree in both suits, dismissing the

(1) 1871. March 14.

SIR JOHN STUART, V.C.:—

It seems to me that the Plaintiffs in the cross cause have entirely failed to shew that they have obtained any such agreement for the purchase of the mine in question as can be recognised by this Court. In this case, as in every case where a question occurs as to a contract, it is necessary to the validity of the contract that it should have been fairly entered into. It is necessary to its validity that there should be, on both sides, a reasonable degree of knowledge as to its subject-matter. The present case is remarkable. It appears that the two Messrs. *Phillips* (who are the Plaintiffs in the original suit) are the owners of a farm of some extent, and that under this farm there are coal mines; that the *Tredegar Coal Company*, of which *Fothergill* and his co-Plaintiffs in the cross suit are members, were owners of a colliery adjoining the land under which the coal mine of the Messrs. *Phillips* existed. Shafts were sunk upon the land of the *Tredegar Company*, and the coal was being wrought in the land adjoining that of the Messrs. *Phillips*. The existence of these shafts, of course, was a material circumstance with regard to the purchase of the adjoining coal mine, in which no shaft had been sunk. Negotiations for a lease of these mines took place; but in the year 1860 the negotiations for a lease came to an end, and there seems to have been no further negotiation between the parties until the month of April, 1863. The contract of which the *Tredegar Company* seek to have the performance was entered into by Mr. *Reed*, their agent, with *Joseph Phillips*, who is one of

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bill in *Fothergill* v. *Phillips* with costs, declaring the agreement for sale not binding on the Messrs. *Phillips*, and ordering it to be delivered up to be cancelled. Then, after a declaration of the

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the owners of the lands and mines in question. It is sworn to by *Phillips*, that in the negotiations for the purchase, which resulted in that which the *Tredegar Company* say is a binding contract, it was stated to him by the company's agent that at that time the quality of the coal under his land was unknown; and that, in fact, the existence of coal there had not been actually ascertained. He says further, that it was represented to him by Mr. *Reed*, the agent of the *Tredegar Company*, that there were two faults in the coal adjoining the land of the Messrs. *Phillips*, which faults must run through the coal under their land. The mention of two faults in the negotiation was, of course, made with a view to depreciate, as a purchaser is entitled to depreciate, the quality of the article he is about to purchase. It is certain that at this time the Messrs. *Phillips* were ignorant that the coal under their land had been actually worked and brought to the surface to the extent of thousands of tons without their leave, and sold by the *Tredegar Company*. What is remarkable in this case is, that if *Reed* tells the truth—and I must assume he has done so—he was as ignorant as the Messrs. *Phillips* that the coal had been worked. If that be so, what is the value of an agreement where both parties are so ignorant as not to know the condition of the subject-matter of the contract? It would be absurd to say, in that state of ignorance, that a valid contract could have been made; and the Court, therefore, has no alternative, in doing justice between the parties, than to say that the bill which has been filed for the specific performance of this agreement must be dismissed with costs. But the matter does not rest there, and the importance of such questions to the public interest makes it my duty to notice this. In cases of mining property there are necessarily great facilities for mistake and for fraud. So strongly has that been felt by the Legislature, that there is an enactment that was alluded to in the course of the argument, which makes the wilful and knowing abstraction of coal which is not the property of the person who works it, a felony. It is needless to go to that extent here. It is needless to say that the gentlemen members of this company, who are the real Defendants in this case—I mean Mr. *Fothergill* and Mr. *Homfray*, and two others—that they personally are guilty; they rely upon the acts and conduct of their agents. But in that reliance, considering the facilities for mistake and for fraud, the duty of this Court is to be extremely careful; and those facilities are not to be in any degree aided by anything done in this Court during litigation if it can be prevented. In this case the *Tredegar Company* thought it consistent with their notions of justice to prevent and prohibit the owner of these lands from going down, or sending down agents, in order to see what they had done with reference to his property. That conduct, I think, was highly improper conduct; it was conduct which came before the Court at the beginning of this litigation under such circumstances that the Court, loth to believe that anything had been improperly done by fraud, allowed the matter to proceed, and was content with having the matter treated, in the

liabilities of the several members of the company and the representatives of deceased members, the following inquiries were directed in respect of the matters to be inquired after:—1. An inquiry what quantities of coal, ironstone, and other produce had been gotten or removed by the partners or any of them, or by any other person or persons by their or any of their order, &c., from or under the Messrs. *Phillips*' farm; and it was ordered that the market price or value, or as near thereto as might be, of all

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then state of things, upon the plans which were made on behalf of the *Tredegar Company* themselves. Fortunately, in this case the Messrs. *Phillips* succeeded furtively and by stealth in getting an examination without which it is very difficult to say that the truth could have been so clearly ascertained as it has been, because it is impossible not to observe upon the unscrupulous character of the evidence which has been given on behalf of the *Tredegar Company*, and ignorance by the members of the company of what is done is no excuse whatever in this Court for what is done through their agents. In this case their bill for specific performance, which I think it my duty to dismiss with costs, is only a cross bill. When the Messrs. *Phillips* discovered, or their suspicions were aroused, and they knew enough to suspect that great injury had been done to them—when that occurred, they filed their original bill and began this litigation; and the case was represented by the Defendants on their bill, and before the cross bill was before the Court, as a case of men who had entered into an agreement to sell coal mines, and who, on various pretexts, were endeavouring to escape from the agreement into which they had entered. In that state of matters the Court could know nothing of the truth but from the representations on both sides. Now that all the truth is disclosed, it shews a case which is a lesson to the Court, and ought to be a lesson to owners of coal mines, of the ease with which mistakes, and even frauds, may be committed under such circumstances.

I do not think it necessary to enter into the question as to whether one of these two gentlemen was bound by this agreement. The owners of the land and the mines were *Joseph* and *John Phillips*; the agreement was signed by *Joseph* alone; *John* never signed it, says he never assented to it. He says he did not openly express his dissent, because he and his brother were in the grasp of mortgagees, and he was afraid. To say that his abstaining, under such circumstances, from interfering, can amount to acquiescence, seems to me impossible; and if it were necessary to decide the case upon that, after hearing all that has been said with reference to the law upon that subject, and the authorities that have been cited, I should have held decidedly that *John* had done nothing by which to bind himself to this agreement; and on that ground alone the bill might have been dismissed. But upon public grounds it is much more important; therefore it is upon the other ground that I wish it to be understood that I deal with this case and dismiss the bill.

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such coal, &c., at the pit's mouth—all just allowances being made to the Defendants in the first suit in respect of their charges and expenses (if any) on account of the carriage to the pit's mouth of such coal, &c., but no allowance being made for the expenses of getting, severing, or working the same—should be certified. 2. An inquiry what quantities of coal, ironstone, and other produce had been conveyed from the collieries and mines of the Defendants in the first suit, or any of them, over or through the roads or passages under the Plaintiffs' farm. And also what quantities of coal, ironstone, and other produce had been wrought and gotten out of the collieries and mines of the Defendants in the first suit, which had been drained or ventilated through the watercourses, roads, passages, or aircourses under the Plaintiffs' said farm. 3. An inquiry what amount, upon the result of the inquiry last directed, ought to be paid by the Defendants in the first suit to the Plaintiffs in the first suit for wayleave and royalty in respect of the user by the Defendants in the first suit of the said watercourses, roads, passages, and aircourses, for the purpose of working or ventilating their said collieries and mines. 4. An inquiry whether the said farm and the mineral property of the Plaintiffs in the first suit under the same had sustained any, and (if any) what amount of damage by reason of the manner in which the Defendants in the first suit had worked the coal, &c., under the Plaintiffs' farm, or by reason of the improper working of the Defendants' mines in respect of the letting in of water from the Defendants' mines or otherwise. A perpetual injunction was granted to restrain the Defendants in the first suit from working under the farm, and from using any watercourse, road, passage, or aircourse under it; and an order was made for giving the Plaintiffs in the first suit access for the purpose of the inquiries. An injunction was granted to restrain, until the completion of the inquiries, the stopping up of passages affording access to the mines under the farm. Liberty of access was also given to the Plaintiffs in the first suit for the purpose of stopping up all passages into their mines, and directions were given for ascertaining the expenses of so doing. The costs of the first suit up to the hearing were given to the Plaintiffs, and further consideration was adjourned.

Rowland Fothergill appealed from this decree.

Mr. *Dickinson*, Q.C., and Mr. *Homersham Cox*, for the Appellant:—

The evidence shews that there was not any misrepresentation on the part of the Petitioners, and that the price agreed to be given was the full value.

[The LORD CHANCELLOR:—Your difficulty is, that you suppressed the fact of your having worked the coal. It is like killing a man's horse and then making an offer to buy it, leaving him to suppose that it is still alive.]

We submit it is rather like buying a box of gold from which the purchaser, unknown to the vendor, has abstracted some pieces. The vendor puts his price upon it on the footing that all the gold is there, so he cannot be damnified. The agreement then, we submit, was good, and *John Phillips* must by his conduct be taken to have ratified it. But, supposing the Court against us on the main point, the decree is too severe. The cases shew that the mode of taking the account is different, as the minerals have been taken innocently or fraudulently: *Powell* v. *Aiken* (1); *Morgan* v. *Powell* (2); *Martin* v. *Porter* (3); *Hilton* v. *Woods* (4). Here the milder form of account ought to have been directed, for the company worked under a *bonâ fide* belief that they were purchasers.

Mr. *Green*, for Respondents in the same interest.

Mr. *Greene*, Q.C., Mr. *Fry*, Q.C., and Mr. *Higgins*, for the Messrs. *Phillips*, were not called upon as to the main substance of the decree, but only on the question whether the inquiries as to minerals gotten out of the company's mines, which had been drained or ventilated through the mines of the Messrs. *Phillips*, should be retained.

LORD HATHERLEY, L.C.:—

As regards the main question in dispute, I consider that the decree is perfectly right. The case is no doubt an important one, but it is one in which the Defendants in the first suit have

(1) 4 K. & J. 343.
(2) 3 Q. B. 278.
(3) 5 M. & W. 351.
(4) Law Rep. 4 Eq. 432.

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managed to place themselves most completely in the wrong, and it would be impossible, under the circumstances, for this Court to decree specific performance of the agreement.

I must confess that I was considerably impressed with Mr. *Dickinson's* argument, that it was too late for *John Phillips* to say that he was not bound by the contract, after having lain by so long without expressing any dissent, though perfectly aware from the first of his brother having entered into it professedly on his behalf. In the view I take of the case it is unnecessary to decide this point, and I have not heard the Respondents upon it; but, as at present advised, I am of opinion that it was the duty of *John Phillips*, if he dissented, to express his dissent as soon as he was informed of what his brother had done, and that if there had been nothing more in the case he must have been taken to have ratified the agreement.

With regard to the question of undervalue, I have not heard the argument of the Respondents, but I am not impressed by the evidence that the sale was at an undervalue, for the property is a farm surrounded by other mineral property of the company, and not of sufficient extent to be advantageously worked as a separate colliery. Moreover, there is evidence of the existence of faults in the property; but, in my opinion, it is unnecessary to decide the question of undervalue. Mr. *Dickinson* made considerable impression upon me while commenting upon the judgment of the Vice-Chancellor; but although His Honour's words might seem at first sight to indicate a wider range, it seems to me, on consideration, that his judgment is really founded upon that on which I found mine, viz., that the gentlemen who are now seeking specific performance of the contract were, at the time when it was entered into, aware of important facts not known to the Appellants, and which ought to have been disclosed to them. This Court requires the utmost good faith between buyer and seller, and will not specifically enforce a contract which is not entirely according to good faith. In the present case the state of circumstances is not merely that the company knew something with regard to the value of the coal which was not known to the vendors, but that the company knew this fact, of which I must take it on the evidence the vendors were entirely ignorant, viz., that the company had helped them-

selves to a large portion of the property. If a man knows that he has committed a trespass of a very serious character upon his neighbour's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case, and to say to him, "I regret that from mistake" (if it be mistake, and I will assume it to be so for the present purpose) "I have taken some two thousand tons of your coal. I do not know what your view of the case may be; I am ready to buy the property out and out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal which I have taken." The proposal which he makes is not in reality a simple proposal for purchase of the property; it involves a buying-up of rights which the owner has acquired against him, and of which the owner is not aware. He is therefore bound to inform the owner of the circumstances of the case, and is not at liberty to enter into a contract without disclosing his commission of an act which has rendered him liable to certain consequences, and of which act the person with whom he is dealing has a right to be informed in order to know what course he is to adopt. The observations of the Vice-Chancellor, as to the purchasers knowing more of the value than the vendors did, would, if I may venture to say so, have been erroneous if made without reference to the special circumstances of the case. I apprehend it would be an error to say generally that you cannot enforce a contract in this Court where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good. But I apprehend that the Vice-Chancellor meant his observations to be understood with reference to the circumstances of the particular case, and that when he says the vendors did not know the subject-matter of the contract, he means that they did not know that coal had been taken to the extent of 2000 tons, and that in that state of circumstances they could not be held to the bargain. If, indeed, undervalue were shewn, this observation would naturally suggest itself: the case is not merely that the purchasers, being more experienced men, knew the value

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of the coal better than the vendors, but that the vendors being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it in order to test its value, and did not communicate to the vendors the result. I apprehend that in such a case the Court, whatever it might do as to cancelling the contract, certainly would decline to enforce it. The case would, I think, be something analogous to this: Suppose a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and thus finds a mark shewing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist. I do not, however, dwell on that point, as it is not satisfactorily established in my mind that the price was inadequate. The ground of my decision is, that the Appellants suppressed the fact of their having wrongfully got a large quantity of the Respondents' coal, and so given the Respondents a heavy pecuniary claim against them. Mr. *Cox* contended that this was no prejudice to the vendors, for that they bargained for the sale of the whole concern, so that this coal was paid for. This argument is not sound; for, according to the principle of *Martin* v. *Porter* (1), the vendors are entitled to be paid for the coal wrongfully severed a sum much greater than its value while ungotten; and I do not think it possible for a person in any case secretly to subtract from his neighbour's property, and then to bind him by an agreement for the sale of the property without communicating to him the fact of the encroachment. I think that the company have only themselves to blame for the position in which they are placed, and that the decree as a whole is correct.

I at first felt some doubt as to compensation for wayleave; but on further consideration I think that on principle it ought to be given, whether the cases have as yet gone that length or not. Here is a man doing a surreptitious act, which cannot be discovered except through the medium of a bill. Under the old practice there would have been a bill for discovery of the thing, and then an action for damages in respect of it would have been brought; but this Court has now the power to grant compensation in respect of

(1) 5 M. & W. 351.

a continuously accruing damage *de die in diem*, arising from a continuous trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through the Respondents' property. These damages cannot be better assessed than by an inquiry what is fit and proper to be paid for wayleave for the coals carried through the property. I therefore affirm that part of the decree.

I think, however, that there is not enough alleged on the pleadings, or proved, to establish the title of the Respondents to compensation for the improper working of the Appellants' mines. Then as to the account which has been directed, of what quantities of coal have been brought out of the Appellants' mines which have been drained or ventilated by means of the mines of the Respondents: this opens an inquiry enormously expensive in itself, and subject to the gravest objection. It would be a question, among other things, as to what particular portion of the company's mine would be affected. Then, moreover, there is no allegation in the pleadings as to the drainage, properly so called, of one mine through the other. The drainage for which miners pay is the carrying away the water from their own mine in a drift or channel into another drift or channel in their neighbour's mine, carrying it by an artificial channel. The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint against the owner of the other mine. The owner of the upper mine has a right to work it just as he likes, and his neighbour below cannot complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement. Then as to ventilation, the air-shafts which have been made for the purpose of getting the Respondents' coal must be of some value for the ventilating some parts of the company's mine; but it is not probable that they can be of much value for that purpose; and I do not find anything in the evidence to shew that they were made for any other purpose than that of ventilating the works which the company were carrying on for the purpose of improperly getting the Respondents' coal. Upon the whole, therefore, I do not think that I ought to direct this extensive and vexatious inquiry, which is likely to be productive of no useful result to any of the parties litigant.

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The decree must therefore be varied by striking out the declarations as to the right of the Respondents to compensation for any improper working of the company's own mines, and in respect of drainage or ventilation, and the corresponding inquiries; but these slight alterations do not affect the costs of the appeal, which must be paid by the Appellant.

Solicitors: Messrs. *Peachey & Lloyd;* Messrs. *Sharp & Ullithorne.*

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Will—Class—Children living at Death of Tenant for Life.

A testator gave his residuary personalty to a niece for life, and directed his trustees after her decease to pay and divide it unto and amongst all and every the children of his said niece who should be living at the time of her decease, if more than one, equally; and if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my said niece," with maintenance clauses:—

Held (reversing the decision of *Stuart*, V.C.), that the representatives of children of the niece who attained twenty-one, but died in her lifetime, took no share, for that the words "but not to be transferred until after the decease of my said niece" were not contradictory to the previous expression confining the class to children who survived the niece, and being in any view of the case surplusage, could not be held to modify the definition of the class.

Semble, that the representatives of children surviving the niece and dying under twenty-one, would have taken.

THIS case came before the Court on two appeals from part of an order of Vice-Chancellor *Stuart.*

John Ball Mason, by will, dated the 21st of December, 1809, directed his real and personal estates to be got in and converted into money by his trustees and invested as therein mentioned, and he directed his trustees to stand possessed of the funds in trust, to pay the income to his niece *Sarah Williams,* the wife of *John Williams,* during her life for her separate use; "and after the decease of my said niece, in trust to pay and transfer the whole of the said principal money arising from my said personal estate,

and from the sale of my said hereditaments and premises directed to be sold, and the stocks, funds, &c., unto and amongst all and every the children of my said niece, already born, or hereafter to be born, which shall be living at the time of her decease, if more than one, equally, share and share alike; and if only one, then wholly to such only child, and the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my said niece. And it is my will that, in case any of the children of my said niece shall be under the age of twenty-one years at the time of her decease, then the dividends and interest of such of the legacies and shares as shall not then have become vested shall from time to time be applied by my said trustees for and towards the maintenance, education, and bringing up of the child or children who may be presumptively entitled thereto in the meantime until his, her, or their share or shares shall become payable as aforesaid: Provided always, and it is my will, that my said trustees, or the survivors or survivor of them, his executors or administrators, shall and may pay and apply such part as they shall think proper of the legacy or legacies aforesaid as shall not then have become vested in the putting the child or children who may be presumptively entitled thereto to any profession or business." The will did not contain any further disposition of the fund.

The testator died soon after making his will. *Sarah Williams*, the tenant for life of the residue, did not die till 1869. She had six children who attained twenty-one. Three of them survived her; two died in her lifetime, the remaining one had not been heard of for some months previous to her death, and it was uncertain whether he was living or dead.

Vice-Chancellor *Stuart* made a declaration that all the children of *Sarah Williams* who attained twenty-one took vested interests, whether they survived their mother or not. The appeals were from this declaration, and the directions consequent upon it.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for one of the appeals; Mr. *Greene*, Q.C., and Mr. *Charles Browne*, for the other:—

The surviving the mother is made an integral part of the description of the class who are to take; and those who do not

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survive her are not objects of gift: *Newman* v. *Newman* (1); *Bull* v. *Pritchard* (2); *Vawdry* v. *Geddes* (3); *Festing* v. *Allen* (4). The words "him or them" refer only to the class previously described. The words "not to be transferred," &c., are only added *ex abundanti cautela* to shew that the life estate was not to be cut down by the direction that shares should vest at twenty-one. There is no inconsistency between the clauses, but the latter is surplusage. *Farrer* v. *Barker* (5) and *Sheffield* v. *Kennett* (6) are very similar to the present case; and *Re Payne* (7) was under a will more favourable to the earlier vesting than this.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, Mr. *Hinde Palmer*, Q.C., and Mr. *W. Pearson*, Mr. *Morgan*, Q.C., and Mr. *Badcock*, for the representatives of children who died in the mother's lifetime:—

The direction to pay and transfer does not constitute the entire disposition, and the Court will readily, in favour of vesting, control the prior words by the context: *Browne* v. *Browne* (8); *Doe* v. *Hopkinson* (9); *Doe* v. *Nowell* (10); *Phipps* v. *Ackers* (11); *Jarman* on Wills (12). The language of the maintenance and advancement clauses shews that the testator contemplated that there might be shares vested before the death of the tenant for life. The first part of the clause may be read as only describing the time of payment, the gift beginning with the words "to be a vested interest." The will is unintelligible as it stands, and something must be rejected. Effect should be given to the words "all and every the children," as in *Ellis* v. *Maxwell* (13).

Mr. *Mackeson*, Q.C., for the trustees of the will.

LORD HATHERLEY, L.C.:—

I should have been very glad, if possible, to have let in the larger class of children, which the Court is always anxious to do. In the first place, it may be noticed, as the Vice-Chancellor ob-

(1) 10 Sim. 51.
(2) 1 Russ. 213.
(3) 1 Russ. & My. 203.
(4) 5 Hare, 573.
(5) 9 Ibid. 737.
(6) 4 De G. & J. 593.
(7) 25 Beav. 526.
(8) 3 Sm. & Giff. 568.
(9) 5 Q. B. 223.
(10) 1 M. & S. 327.
(11) 9 Cl. & F. 583.
(12) 2nd Ed. vol. i. p. 727.
(13) 12 Beav. 104, 107.

served in *Farrer* v. *Barker* (1), that the Court has pushed some of its conclusions to an extreme length for the purpose of including as many children as possible, first upon settlements, on the ground that a settlement is itself an indication of all children being intended to be provided for; and then in wills, it has followed the same rule, where a father is providing for his children, or where any person, who has placed himself *in loco parentis*, is providing for the family. In such cases, if there is a single link wanting in the chain of referential words connecting and identifying the children who are being spoken of with those comprised in a description requiring them to survive a given period, the Court will take advantage of this to let in all the children, whether they survive that period or not. Now, although in those cases extraordinary liberty has been taken with the language of the instruments, I am not intending in any way to impeach their authority; but I do not think that this case is governed by them. In the first place, this testator does not appear to have stood *in loco parentis* towards the objects of his bounty. He was desirous of providing for his niece and her children, but I do not find that there was any special relation between them beyond that attachment which he might form for any member of his family. He, therefore, must be taken to have meant what he has said, which is the only rule to be followed, unless there are special circumstances which allow considerable latitude in the interpretation to be put upon a testator's will. The Vice-Chancellor himself did not doubt, upon the first part of the will taken alone, that the words "which shall be living at the time of her decease" defined the class, and I do not see how that restriction can be broken in upon by anything that follows. The gift is to the niece for life, and after her death there is, I will not say a gift, but there is a direction to pay the fund "unto and amongst all and every the children of my said niece already born, or hereafter to be born, which shall be living at the time of her decease; if more than one, equally, share and share alike, and if only one, then wholly to such only child." The Vice-Chancellor, I think, agrees with the view I am now taking, that, if this were all, only those children who survived their mother could take. Then come these words: "and the same to be a vested interest in

(1) 9 Hare, 737.

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him or them respectively on their respectively attaining the age of twenty-one years." Now, can I apply that to "all the children born or to be born"? Must I not apply it to the class which the testator has formed, namely, those of them who shall be living at the time of their mother's decease? I see nothing to justify me in saying that the words "him or them" do not denote that class, and that class only, of which he has been before speaking, which class did not consist of all the children born or to be born, because the testator has added the condition that they must be living at the death of their mother; and he then imposes the further condition that they must attain the age of twenty-one years before payment is made to them. Now, stopping there for a moment, there is nothing at all irrational in such a disposition; for it might naturally enough occur to the testator's mind, when he was directing a fund to be paid to all his niece's children who should be living at her death, that there might be infants; so, in substance, he says: "I have directed payment to a class, but I will take out of that direction as to payment all who shall not attain twenty-one; and although they have survived my niece, yet, if they have not attained twenty-one, they are not to be entitled to be paid." It is argued that in this clause he contemplates a vesting at a different epoch from the epoch which is first mentioned, viz., a vesting at twenty-one instead of at the niece's death. I think, however, that there is a fallacy in that reasoning. A number of cases have been cited, such as *Phipps* v. *Ackers* (1), where the question was not, what was the class, but what was the age at which the gift was to vest? That class of cases throws no light on a case where the question is, not at what time the gift is to be vested, but who are the persons constituting the class in whom anything is to be vested? The testator, having pointed out a class, proceeds to say that the gift shall not be vested so as to enable them to claim payment unless they attain twenty-one years of age. Then come the words which alone raise the difficulty, and which, as the Vice-Chancellor thought, left him at liberty to alter the words as to the class—"the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred

(1) 9 Cl. & F. 583.

until after the decease of my said niece." It certainly would strike any one at first sight, on reading those words, that an idea had crossed the mind of the testator that the children of the niece would take an interest in her lifetime on attaining twenty-one; but do the words really shew that he intended this? If they had been contradictory to the previous disposition, I should have followed the cases in which even a slight expression inconsistent with the restriction of the class has been held sufficient to do away with that restriction. But in the present case the words relied on are only surplusage, and surplusage whether the class be confined to children living at the death of the niece or not. If the gift had been, "and after the decease of my said niece, upon trust to pay and divide the same unto and amongst all and every the children of my said niece; and if more than one, in equal shares, and the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years," which is the way in which I am asked to read it, the addition of the words "but not to be transferred till after the death of my said niece" would be the merest surplusage, for nobody could suppose that the children, on taking vested interests at twenty-one, were to have their shares in the fund at once transferred to them, so as to deprive the mother of the life interest. In whichever way the will is read these words are entirely surplusage. I therefore find extreme difficulty in following the Vice-Chancellor in saying that the words must have the effect of altering the meaning of the expression by which the testator has, with sufficient clearness, pointed out a particular class, because otherwise they would be useless. They are just as useless when I have made that alteration, and I have not advanced a step by doing it. I am asked, therefore, to alter the meaning of clear words on account of useless and unmeaning words, which remain surplusage when I have done so.

I do not think that the following part of the will carries the Respondents any further. The testator's mind is always looking at a class to be ascertained at the death of his niece—all her children who survive her. He contemplates the possibility of there being two sets of objects in this class—those who have attained twenty-one, and those who have not. Those who have attained twenty-one at the death of the niece are entitled to payment. He then goes on to provide for another division of the class—those who have not

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attained twenty-one :—[His Lordship here read the maintenance clause.] I think that the testator here has used the word "vested" in the sense of "payable." The only direction for payment was at the death of the niece, and the only other direction was about vesting. This is evidently not at the death of the niece, because it is to take place upon their attaining twenty-one after the death of the niece ; and in the meantime the dividends and interest of such of the shares as have not become vested are to be applied in the maintenance and education of the child or children presumptively entitled thereto. I do not think that the testator intended the share of a child who survived the niece to be undisposed of because he never attained twenty-one. The fact that the whole interest is to be paid for maintenance, and that the share is called the presumptive share of the child, would go very far to shew that the child, having survived the tenant for life, would become entitled, although there was no right to call for payment until twenty-one, and that, on his dying under twenty-one, his representatives would have a right to call for his share. The event has not happened, but I am obliged to notice the question, because it bears on the construction of the will ; for it might well be argued that it was absurd to give to the will a construction which, if the children had all survived the niece, and then five had died under age, would produce an intestacy as to five-sixths of the fund, there being no cross-remainders or gifts over between the children. I think the scheme of the will is this : the testator forms a class, and that class being formed, he has said that the parties shall not take any interest which shall entitle them to call for payment till they attain twenty-one, whether they attain twenty-one in the lifetime of their mother or not. I cannot find in the will words which would justify me in breaking down the clear direction for payment to those only who fulfil the condition of surviving the niece, and I am obliged, therefore, on that account, to differ from the Vice-Chancellor ; and His Honour's order must be varied by substituting a declaration that those children only of this lady, who survived her, became entitled to share in the bequest.

Solicitors : Mr. *W. Hammond ;* Messrs. *Surr & Gribble ;* Messrs. *Freshfield ;* Messrs. *Iliffe, Russell, & Iliffe ;* Messrs. *White & Sons ;* Messrs. *Vizard, Crowder, & Co.*

WARD *v.* WARD.

L. C. 1871 July 14.

Statute of Limitations—Wrongful Possession—Joint Tenancy.

A testator devised a copyhold in 1796 to *R. W.* for life, with remainder to her children as tenants in common, without words of limitation. *R. W.*, who had three children, let the property to her two sons, *R. L.* and *B.*, and after the death of *R. L.* to his son *R.* and *B.*, who occupied the estate together till the death of *R. W.* in 1841. On *R. W.*'s death the property—subject, as to one-third, to *B.*'s life estate—belonged in moieties to *R.* and *X.*, as the co-heirs of the testator. *R.* and *B.* continued to occupy the whole property as owners, and farmed it at their equal expense, till the death of *B.* in 1862, after which it was similarly farmed by *B.*'s son and *R.* till 1869, when *B.*'s son died. The devisee of *B.*'s son afterwards filed a bill for a partition:—

Held (affirming the decision of *Malins*, V.C.), that *R.* and *B.*, as regarded that third share, of which their possession became wrongful on the death of *R. W.*, must be considered as joint tenants; and that as *B.* had died first, his interest in the estate had determined, and the Plaintiff had no title.

THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Malins*, dismissing her bill for partition of certain copyholds.

Robert Lenton died in 1796, having devised the copyholds in question to his wife *Jane Lenton* for life, with remainder to his son-in-law *Bryan Ward* and *Rebecca* his wife, for their lives, and after the decease of the survivor, to the use of all the children of *Rebecca Ward*, in equal shares, as tenants in common, without any words of limitation, or any other words which could give the children more than life estates. *Rebecca Ward* had three children —*Robert Lenton Ward*, *Bryan Edward Ward*, and *Rebecca Laxton*. *Jane Lenton* was admitted tenant in 1796, and died not long afterwards. *Bryan Ward* was then dead, and *Rebecca Ward* entered into possession, and let the property to her two sons, *Robert Lenton Ward* and *Bryan Edward Ward*, until the death of *Robert Lenton Ward* in 1836, after whose death his son, the Defendant *Robert Ward*, and *Bryan Edward Ward* occupied the land as tenants till the death of *Rebecca Ward* in October, 1841. *Rebecca Laxton* had died in 1828. From *Rebecca Ward's* death the Defendant *Robert Ward* and *B. E. Ward* occupied the land as owners, stocking it at

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their equal expense, and paying the outgoings in moieties, till May, 1862, when *B. E. Ward* died.

From the death of *B. E. Ward*, his son, *John Thomas Ward*, and the Defendant *Robert Ward* occupied the land as owners, stocking it at their equal expense, and paying the outgoings in moieties. *J. T. Ward* died in January, 1869, leaving a will, by which he devised all his landed property to the Plaintiff absolutely. After his death the Plaintiff entered into possession of a moiety, which she let to a tenant.

The testator, *Robert Lenton*, left three daughters, who were his co-heiresses—*Mary Brown*, who died in 1811, intestate, and was represented by the Defendant *W. Brown*; the above-named *Rebecca Ward*, represented by her grandson, the Defendant *Robert Ward*; and *Jane Lenton*, who died intestate in 1821, leaving *Rebecca Ward* and the Defendant *William Brown* her co-heirs and co-heirs of the testator. On *Rebecca Ward's* death the reversion in fee descended to *Robert Ward* and *William Brown* as the then co-heirs of the testator.

The Plaintiff filed her bill in December, 1869, for partition, alleging that, by virtue of the *Statute of Limitations*, she and the Defendant *Robert Ward* were entitled to five-sixths of the property, and the Defendant *W. Brown* to the remaining one-sixth.

The Defendants, by answer, alleged that *Bryan Edward Ward* was only a joint tenant with the Defendant *Robert Ward* of that share of the estate of which he and *Robert Ward* were not lawfully in possession, and that, as he had died before *Robert Ward*, *John Thomas Ward* never acquired any title. Vice-Chancellor *Malins* acceded to this view, and dismissed the bill without costs.

Mr. *Townsend*, for the Appellant:—

I contend that the Appellant is entitled to a decree such as in *Brace* v. *Foulkes* (1). The passage in *Littleton* (2) which was relied on refers to abatement, intrusion, usurpation, and disseisin; but there cannot be any one of these as to a copyhold. *Robert Lenton Ward* and *B. E. Ward* entered lawfully into possession of the entirety, being put into possession by their mother. They began as tenants in common, and the tenancy in

(1) Set. Dec. 3rd Ed. p. 573. (2) Co. Litt. sect. 278, p. 181, a.

common ought to be treated as having subsisted throughout, which is the view that the persons interested took of the case till after the death of *J. T. Ward*. *B. E. Ward*, therefore, acquired an interest under the *Statute of Limitations*.

Mr. *Cole*, Q.C., and Mr. *Horsey*, for the Respondents, were not called upon.

LORD HATHERLEY, L.C.:—

I think that the Vice-Chancellor has come to a correct conclusion in this case.

The title stands in a very singular position. The Plaintiff claims under *John Thomas Ward*, the son of *Bryan E. Ward*. *Bryan E. Ward* and his nephew, the Defendant *Robert Ward*, were in possession of the property from 1836 to 1862. Up to 1841 they occupied under the testator's daughter, who was tenant for life of the entirety; and on her death in that year the title stood thus: *Bryan E. Ward* was entitled to one undivided third for his life under the will of the testator, and to no other interest; *Robert Ward* was entitled in fee, as one of the co-heirs of the testator, to one-third in possession, and to a moiety of another third in reversion expectant on the determination of *Bryan E. Ward's* life estate; and the other co-heir was entitled to one-third in possession, and a moiety of a third in reversion expectant on *Bryan E. Ward's* life estate. From 1841, therefore, *Bryan E. Ward* and *Robert Ward* held possession of one-third of the property unlawfully, and remained in possession of it for more than twenty years.

Now, suppose it had been a simple case of a farm wrongfully entered into by two persons, then, according to the passages cited from *Coke* upon *Littleton*, they would, being disseisors, enter as joint tenants, and would acquire seisin as such. Here two persons are in lawful possession of a copyhold; the title under which they hold it comes to an end, but they continue in possession, and thus go on holding a certain share of the property without any title whatever. In what capacity do they so hold on? It appears to me as joint tenants. The possession of each became wrongful as to this share at the same moment of time, so that they acquired their title at the same moment of time, they held by one common

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right or by one common wrongful title, whichever you please to call it, and they have done nothing to sever their tenancy. The case is very analogous to that of one of three tenants in common conveying his share to the other two without words of severance. The two are joint tenants of the share so conveyed, though they remain tenants in common as to their original shares. As to the business carried on by *Bryan E. Ward* and *R. Ward*, it is not averred that they entered into a joint speculation as farmers, and made this land partnership property, nor is such a view in the least consistent with any of the facts of the case. They appear simply to have held on because no one made any claim against them; and their cultivating the property at their equal expense, and sharing the profits equally, is just what two farmers would do as to land of which they were joint tenants. I am of opinion, therefore, that the Vice-Chancellor was right in holding that, on the death of *Bryan E. Ward*, all his interest in the property ceased, and that the Plaintiff has no title. The appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *Robert Southee*.
Solicitor for the Defendants: Mr. *G. E. Spencer*.

L. C. 1871 *July* 19.

HOBSON *v.* BASS.

Limited Guarantee—Bankruptcy—Surety.

J. H. gave to *B.* a guarantee: "I hereby guarantee to you the payment of all goods you may supply to *E. H.*, but so as my liability to you under this or any other guarantee shall not at any time exceed the sum of £250." *E. L.* gave a similar guarantee. *B.* supplied goods to *E. H.* to the amount of £657. *E. H.* then became bankrupt. *B.* proved for the whole sum, and then called on the guarantors, who paid him £250 each. *B.* having afterwards received a dividend of 2*s.* 1*d.* in the pound on the £657:—

Held (reversing the decision of *Stuart*, V.C.), that each of the guarantors was entitled to a part of this dividend, bearing to the whole the same proportion as £250 to £657.

THIS was an appeal by the Plaintiffs from a decision of Vice-Chancellor *Stuart* on a special case.

Edmund Carey Hobson carried on business as a wine and beer

merchant, under the firm of *Jesse Hobson & Son*. The Defendants were the members of the firm of *Bass & Co.*, brewers, of *Burton-on-Trent*. On the 23rd of July, 1868, the Plaintiff, *Jesse Hobson*, gave to the Defendants the following guarantee:—

"In consideration of your having supplied and your continuing to supply Mr. *Edmund Hobson*, trading under the firm of *Jesse Hobson & Son*, goods in the way of his business, I, the undersigned *Jesse Hobson*, of, &c., do hereby guarantee to you the due payment, at three months' notice, of all such goods, whether supplied previous to the date hereof, or which you may from time to time supply to the said *Edmund Hobson*, until you receive notice from me of the discontinuance of this guarantee, but so as my liability to you under this or any other guarantee shall not at any time exceed the sum of £250."

The Plaintiff, *Elizabeth de Lannoy*, on the same day gave a precisely similar guarantee.

On the 16th of November, 1868, *Edmund C. Hobson* was adjudicated a bankrupt. He was indebted to the Defendants for goods supplied to him in the way of his business in the sum of £657. The Defendants shortly afterwards proved in bankruptcy for the whole of this sum.

On the 23rd of June, 1869, the Defendants claimed, under the guarantees, the sum of £250 from each of the Plaintiffs, and each of the Plaintiffs paid them £250 accordingly.

On the 29th of April, 1870, a dividend of 2*s.* 1*d.* in the pound was declared under *Hobson's* bankruptcy, and the Defendants received the sum of £68 8*s.* 9*d.*, being the amount of that dividend on £657. It was expected that a small further dividend would be paid.

The question for the opinion of the Court was, whether each of the Plaintiffs was entitled to a share of the dividends received and to be received in respect of the £657, bearing the same proportion to the whole of the dividends as £250 to £657. Vice-Chancellor *Stuart* made an order declaring that neither of the Plaintiffs was so entitled.

Mr. *Renshaw*, and Mr. *Renshaw*, junior, for the Plaintiffs, in support of the appeal:—

The proof was for the whole debt. Each 2*s.* 1*d.* paid is attributable to a particular pound of that debt, and as to so much of it

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as the sureties paid they are entitled to the dividend. The sureties did not guarantee the ultimate balance to the extent of £500, but the debt to that extent. *Paley* v. *Field* (1), *Bardswell* v. *Lydall* (2), *Ex parte Holmes* (3), and *Thornton* v. *M'Kewan* (4) govern the case. If the contract had been to be liable for £500, after giving credit for all that could be recovered from other sources, the case would have been different. The case is not one where it was part of the contract that all compositions should go to the benefit of the creditor, as in *Ex parte Hope* (5) and *Gee* v. *Pack* (6). The principles applicable to the case are shewn in *Midland Banking Company* v. *Chambers* (7).

Mr. *Fry*, Q.C., and Mr. *Rodwell*, *contrà* :—

The Appellants are led into error by the term "limited guarantee," which may denote either of two things—a guarantee limited as to the part of the account to which it is to be applied, or a guarantee limited as to the total amount to be recovered. The Appellants are right if they can make out this guarantee to be limited in the first sense; but on its fair construction it is limited only in the second. In *Thornton* v. *M'Kewan*, *Ex parte Rushforth* (8), *Bardswell* v. *Lydall* (9), *Raikes* v. *Todd* (10), and *Ex parte Holmes* (11), the guarantee was limited in the first way.

LORD HATHERLEY, L.C. :—

I cannot find any substantial difference between this case and those relied on by the Appellants. If a person guarantees a limited portion of a debt, all the authorities shew that if he pays that portion he has in respect of it all the rights of a creditor. The question is, whether the guarantor means "I will be liable for £250 of the amount which *A. B.* shall owe you," or "I will be liable for the amount which *A. B.* shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250." The words of the guarantee are so similar to those in some of the cases cited

(1) 12 Ves. 435.
(2) 7 Bing. 489.
(3) Mont. & Ch. 301.
(4) 1 H. & M. 525.
(5) 3 M. D. & D. 720.
(6) 33 L. J. (Q.B.) 49.
(7) Law Rep. 4 Ch. 398.
(8) 10 Ves. 409.
(9) 7 Bing. 489.
(10) 8 A. & E. 846.
(11) Mont. & Ch. 301.

that it would be splitting hairs to distinguish them. The words "at any time" are material, and I think the meaning of the instrument is, "I guarantee the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250. When it reaches that sum I am to be a surety for it with all the rights of a surety." It is not then competent to the creditor to say, "I will increase my debt; I will take a dividend on the whole; and though you have paid me the £250, you shall have no rights as a surety till I am paid in full." It is true that a surety may enter into an obligation to be liable to a limited amount for the ultimate balance remaining after all moneys obtainable from other sources have been applied in reduction of the debt, but a guarantee of that nature must be in a very different form from the present. In *Paley* v. *Field* (1), before Sir *W. Grant*, there were indeed words specifically pointing at the liability of the surety being only for a part of the debt, but the present case is not really distinguishable from *Ex parte Holmes* (2). The question in the case must be answered in the affirmative.

Solicitors: Mr. *R. H. Wilkins*; Mr. *Carpenter*.

Ex parte ROCKE. *In re* HALL.

Bankruptcy—Execution Creditor—Seizure—Sale—Injunction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 13, 95.

After the sheriff, acting under a writ of *fi. fa.*, had seized the goods of a debtor, the debtor presented to the County Court a Petition for liquidation by arrangement, thereby committing an act of bankruptcy, and on the same day obtained an injunction restraining the sheriff from proceeding to a sale. The sheriff, however, sold the goods, and paid the balance of the proceeds of the sale into the County Court:—

Held (reversing the decision of *Bacon*, C.J.), that the execution creditor, and not the trustee under the liquidation, was entitled to the money in Court.

An injunction granted under the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 13, is merely for the protection of the debtor's estate, and has no effect on the rights of the creditors *inter se*.

MESSRS. *ROCKE, EYTON, & Co.*, bankers at *Ludlow*, had recovered judgment in three actions against one *Henry Hall*, a farmer,

(1) 12 Ves. 435. (2) Mont. & Ch. 301.

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and on the 21st of November, 1870, they caused execution to be issued against him in each of the actions, and three writs of *fi. fa.* were accordingly placed in the hands of the sheriff of *Herefordshire*. On the 23rd of November the sheriff, acting under these writs, seized certain goods of *Hall*, and advertised them for sale. On the 26th of November, *Hall*, who appeared not to have been a trader, presented to the County Court a Petition for liquidation by arrangement, and on the same day an injunction was obtained by him from the County Court restraining the sheriff from proceeding to a sale; and this injunction was served on the sheriff's officers in possession. The sheriff, however, proceeded to sell the goods. The sale produced £269, out of which the sheriff paid £185 for rent due by *Hall*, and retained £28 for his own charges. He subsequently, being threatened for contempt, paid the balance of £56 into the County Court. On the 24th of December a meeting of the creditors of *Hall* was held, when a trustee was appointed, and a liquidation by arrangement was agreed to. No receiver had been appointed, and neither Messrs. *Rocke, Eyton, & Co.*, nor their solicitors, had notice of the proceedings in bankruptcy until the 9th of December.

On the 21st of January, 1871, the County Court Judge made an order for payment of the sum in Court to the trustee under the liquidation.

The execution creditors, whose debt exceeded the balance in Court, moved before the Chief Judge by way of appeal from this order. The appeal was dismissed with costs (1).

(1) 1871. April 17.

SIR JAMES BACON, C.J., said that he had no doubt as to the power of the Court, after a Petition for liquidation by arrangement had been presented, to grant an injunction restraining creditors from proceeding in any action or with any execution. Nor could this power be said to be unjust, or to interfere with the policy of the law of bankruptcy, the object of which was to secure a fair and equal distribution of the assets amongst the creditors. His Honour thought that the injunction was granted in this case with perfect regularity, and was sufficient, though it only mentioned one action, whilst there had, in fact, been three actions, and though no receiver had been appointed, as the high bailiff occupied that position. The injunction having, therefore, been duly issued and served, everything had been done which was necessary to stay further proceedings, and all the further proceedings were illegal. There was in *Ex parte Todhunter* (Law Rep. 10 Eq. 425) no injunction, and consequently nothing to prevent the operation of the rule laid down in *Edwards* v. *Scarsbrook* (2 B. & S. 280; 32 L. J. (Q.B.) 45), that notice of an act of bankruptcy, according to sect. 133 of the Act of 1849, which

The execution creditors then moved in the Court of Appeal in Chancery by way of appeal from this order, and the motion came on to be heard before the Full Court.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the Appellants:—

The only distinction between this case and *Ex parte Todhunter* (1) is, that no injunction was there granted; but that can make no difference, as an injunction granted under the 13th section of the *Bankruptcy Act*, 1869 (2), or rule 260 of the Bankruptcy Rules, 1870 (3), is only for the interim protection of the property, and cannot alter any rights: *In re Anderson* (4). The case is, in fact, governed by *Edwards* v. *Scarsbrook* (5), which was under sect. 133 of the Act of 1849 (6), and that section is virtually re-enacted by sect.

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corresponded with the 95th section of the Act of 1869, must be taken to mean notice of an act of bankruptcy committed prior to the seizure. And it was to be observed, as was observed in *Ex parte Veness* (Law Rep. 10 Eq. 424), that the 184th section of the Act of 1849, which relates to secured creditors, was not re-enacted in the late Act. The Judge of the County Court, seeing that the provisions of the Act had been strictly complied with, and that the rights of the creditors were equal, could not do otherwise than prevent the execution creditors from obtaining any advantage by their proceedings; as, from the moment that the injunction was served, those proceedings ought to have been stayed. The sheriff had only extricated himself from the consequence of his acts by paying the money into Court, and the money was now in the position in which it ought to have been on the 26th of November. His Honour entirely adhered to his decision in *Ex parte Todhunter*, which did not at all affect the decision in this case, inasmuch as the right of the judgment creditor was stayed by the injunction which had been granted.

(1) Law Rep. 10 Eq. 425.

(2) Sect. 13 is as follows: "The Court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy; or it may allow such proceedings, whether in progress at the commencement of the bankruptcy, or commenced during its continuance, to proceed upon such terms as the Court may think just."

(3) Rule 260 is as follows: "The Court may, at any time after the presentation of a petition, restrain further proceedings in any action, suit, execution, bankruptcy petition, or other legal process, against the debtor or his estate in respect of any debt provable; or it may allow such proceedings, whether in progress at the filing of the petition, or subsequently commenced, to proceed upon such terms as the Court may think just."

(4) Law Rep. 5 Ch. 473.

(5) 3 B. & S. 280.

(6) 12 & 13 Vict. c. 106, s. 133: "That all payments, &c., and all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and

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95 of the Act of 1869. *Slater* v. *Pinder* (1) had not been decided when this case was before the Chief Judge, otherwise the decision would, no doubt, have been different.

Mr. *Kay*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

The 3rd sub-section of the 95th section of the Act of 1869 shews what was to be protected against the trustee—that is, goods which had been seized and sold without notice of any act of bankruptcy. Here the goods had been seized but not sold, before notice: *Ex parte Veness* (2). An execution creditor has no property in the goods seized, and gets nothing until after the sale: *Giles* v. *Grover* (3); *Wilbraham* v. *Snow* (4). To hold that this seizure is sufficient would alter the definition of a secured creditor in sect. 16, sub-sect. 5. [*Ex parte Key* (5) was also cited.] It is clear that, if there had been an injunction, the decision in *Ex parte Todhunter* (6) would have been different.

Lord Hatherley, L.C.:—

It appears to me that the main question in this case has been already decided by the learned Chief Judge himself in *Ex parte Todhunter*, which amounts to this, that if there has been a seizure by the execution creditor before the act of bankruptcy, then he is left in possession of his rights against the effects of the bankrupt. The distinction between the provisions of the Act of 1849 and those of the late Act is, that whereas, under the Act of 1849, both seizure and sale were necessary to perfect the title of the execution creditor, there is nothing in the late Act to render a sale necessary for that purpose, unless this is to be inferred from the 95th section. But this cannot be inferred, for

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sale before the date of the fiat or the filing of such petition shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided that the person . . . at whose suit or on whose account such execution or attachment shall have issued had not . . . at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed."

(1) Law Rep. 6 Ex. 228.

(2) Ibid. 10 Eq. 419.

(3) 9 Bing. 128.

(4) 2 Wms. Saund. 47 a, p. 87, Ed. 1871.

(5) Law Rep. 10 Eq. 432.

(6) Law Rep. 10 Eq. 425.

even under the Act of 1849 it was held that the words "prior act of bankruptcy" meant prior to the seizure, not prior to the sale; and the apparent object of the 95th section of the Act of 1869 was to protect creditors holding securities, in certain cases, from the loss of their securities by reason of prior acts of bankruptcy.

The question really turns upon the effect of the 13th section of the Act of 1869 — or rather of the 260th rule, which is the corresponding provision applicable to cases of liquidation by arrangement, and the learned Chief Judge based his decision on that section. Unless the injunction which has been granted makes a difference, the right of the execution creditor to compel the sheriff to proceed to a sale cannot be disputed; and it is evident, from the wording of the 13th section and of the corresponding rule, that it is left to the discretion of the Judge whether, in any particular case, he will or will not grant an injunction. But it could not have been the intention of the Legislature to make the rights of the creditors *inter se* depend upon the discretion of a Judge in Bankruptcy in granting or withholding an injunction.

The true meaning of that section is probably that, as there might be disputes to be decided between different judgment creditors as to whether the goods were to be sold or not, the Judge should have power to stay a sale with a view to the better administration of the estate and the protection of the property. But there could have been no intention to alter the rights of the creditors *inter se*, and still less to give the Judge a discretion to decide whether they were to be altered or not.

I cannot agree with the distinction which the Chief Judge has drawn between this case and *Ex parte Todhunter* (1); and if he had had before him the case of *Slater* v. *Pinder* (2), his decision might have been different. The order appealed from must be discharged, and an order made directing the proceeds of the sale to be paid to the execution creditors.

SIR W. M. JAMES, L.J., concurred.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The title of the trustee can relate back to the presentation of the Petition only, and he must take

(1) Law Rep. 10 Eq. 425. (2) Law Rep. 6 Ex. 228.

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subject to any existing rights. The goods were seized before the presentation of the petition, and this gave to the execution creditor a *primâ facie* title to have them sold, which he retains unless there is something in the Act to take away his right. But the 12th section of the Act of 1869, after enacting that where a debtor shall be adjudicated a bankrupt, no creditor shall have any remedy against the property of the bankrupt, except in the manner directed by the Act, goes on to say that this section shall not affect the power of any creditor holding a security upon the property of the bankrupt, to realise or otherwise deal with such security in the same manner as he would have been entitled to realise or deal with the same if this section had not been passed. This section appears to me to be clear and distinct as to the rights of the creditor, and not to be affected by the 13th section.

Solicitors for the Appellants: Messrs. *Cree & Last*, for Messrs. *Southern & Lloyd, Ludlow.*

Solicitors for the Respondents: Messrs. *Cowdell & Grundy*, for Mr. *Andrews, Leominster.*

L. C. and L. JJ. 1871 *April* 19.

In re BLAKELY ORDNANCE COMPANY.

BRETT'S CASE.

Winding-up—Past Shareholders—Release of Debts—Call.

B., being on the B list of past members, bought up and caused to be released to the company all the debts which were due by the company when he ceased to be a shareholder and which remained due at the winding-up:—*Held*, that, though the money raiseable from the A list would be insufficient to pay the debts, no call could be made upon *B.*

In re Accidental and Marine Insurance Corporation (1) disapproved of.

Order of the Master of the Rolls affirmed.

MR. *BRETT*, the Respondent in this appeal, had, on the 10th of June, 1865, 150 shares in the *Blakely Ordnance Company, Limited.* These shares he transferred on the 30th of July, 1865, and the transfer was registered on the 4th of August, 1865. On the 28th of July 1866, an order was made for winding up the company, and

(1) Law Rep. 5 Ch. 428.

Brett's name was placed on the B list of contributories, being the list of past members. The debts of the company due when *Brett* transferred his shares, and remaining due at the winding-up, were two debts amounting to £10,162 and two small debts of £14 each. In October, 1870, each of the creditors for the larger debts assigned, in pursuance of a compromise with *Brett*, their respective debts to one *Russell*, an agent for *Brett;* and *Russell*, by deeds-poll dated the 20th of October, 1865, assigned these debts to the company and the liquidator, the deeds expressing that they were to the intent that the contributories might be exonerated from all further liability in respect thereof by dividend or otherwise.

It was not disputed that *Brett* was aware that the total amount of the money raiseable from the present shareholders would be insufficient to pay the debts of the company, and that a call would shortly be made on the B list.

In November, 1870, the official liquidator applied that a call might be made on *Brett* to the full extent of the capital unpaid on each share held by him, which would amount to £20 on each of the £150 shares.

Amongst the debts stated by the official liquidator as due by the company, and in respect of which the call was made, were the four above-mentioned debts. *Brett* offered to pay the two small debts in full, and contended that there would then remain no debt to which he was liable.

The Master of the Rolls refused to make any order on the application except that the costs were to be paid by the official liquidator, and the official liquidator appealed. A question had been raised whether one of these debts was really due, and the Lords Justices decided that it was due, but reserved the general question of *Brett's* liability for argument before the Full Court.

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the Appellant:—

We admit that Mr. *Brett* is liable only for these four debts and for the costs of the winding-up. But we contend that he must pay this call, and cannot relieve himself by any such scheme as he has adopted. Probably there must afterwards be some adjustment of payments amongst the shareholders, but he must pay the call, as provided by sect. 38 of the Act of 1862 (25 & 26 Vict. c. 89), and

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the money then goes into a common fund: *In re Accidental and Marine Insurance Corporation* (1). These creditors could come upon the present shareholders as well as upon the old shareholders, and all the contributions must be applied in the first instance in payment of all the debts. The rights of every creditor and every shareholder were determined by the winding-up, and cannot now be altered. *Brett* has been settled on the list, and these debts have been proved in the winding-up. At all events, *Brett* is liable to contribute in respect of the costs of the winding-up: Sect. 102. The contributories pay towards the assets, not towards the debts.

Mr. *Jessel*, Q.C., and Mr. *F. Harrison*, for *Brett*:—

The Act of 1862 introduces no new law, but merely alters the course of procedure. The old shareholders must not by any juggle be made to pay the new debts. The new creditors have no equity against the old shareholders, and the Act gives them none. According to the Appellants, if there was only an old debt of £50, the old shareholders might be called upon to pay £1000 in calls for the benefit of the new creditors. There is now no debt existing to which Mr. *Brett* was liable either at law or under the statute, and no call can be made upon him. As to the costs, they are a first charge upon the estate, and are to be paid before the debts. They must be taken to be paid. Suppose there was enough to pay all the old debts, and the costs were entirely occasioned by the new debts, could the old shareholders then be called upon to contribute?

Mr. *Higgins*, in reply:—

These companies are the creatures of statute, and the rights of all parties are regulated by statute, and sect. 38 puts all on the same footing. It is not a question of contribution; all the new shareholders must be exhausted before you can come upon the old shareholders. There will not now be enough to pay all the debts and the costs.

[He cited 11 & 12 Vict. c. 45, s. 56.]

LORD HATHERLEY, L.C.:—

It was most desirable that this case should be fully argued, regard being had to the decision of the Lord Justice *Giffard* in the

(1) Law Rep. 5 Ch. 428.

matter of the *Accidental and Marine Insurance Corporation* (1). The point in that case was not exactly the same as that which we have now before us, but the observations made by the Lord Justice in his judgment, and the reasoning on which he relied, would be such as certainly to render a decision in this case, affirming the decision of the Master of the Rolls, inconsistent with that of Lord Justice *Giffard*.

[His Lordship then stated the facts.]

The question is, whether the call can be enforced against Mr. *Brett*, a shareholder, there being, at the time the call was made, no debt which had accrued antecedently to the time of his ceasing to be such shareholder.

The question turns upon the 38th section of the *Companies Act*, 1862, which has occasioned the difficulty by an attempt to include in one set of words cases of very different descriptions, namely, the case of a shareholder who remains such up to the time of the winding-up, and the case of one who has ceased to be a shareholder within a year of the winding-up, and also the cases of limited liability and of unlimited liability. [His Lordship then read the first part of the 38th section, and said that it shewed a clear intention that every member, past and present, should contribute to the debts and liabilities of the company, and also to the costs and expenses of the winding-up. His Lordship then read the qualifications specified in that section, and said that the question depended upon the first part of the section and those two qualifications. His Lordship then continued:—] Now, I confess, it does appear to me that the late Lord Justice *Giffard* was in some degree led to an erroneous conclusion by supposing that the whole of the arrangement thus made under the Act of 1862, was of so general and arbitrary a character, and did so vary all the usual rights subsisting between the partners in a joint-stock company *inter se* and those between the company and the creditors, as to compel him to give to the Act an interpretation which seemed to follow most closely its literal wording, without any reference to what the past course of law had been in such cases.

Certainly it would require a good deal to convince me that it was intended by the Legislature to alter rules so just as those

(1) Law Rep. 5 Ch. 428.

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which I am about to state, constituting the ordinary relation between partnerships and those who trust them, unless there was something very specific to be found in the enactment itself, and unless no other intention or purpose could be collected from the words used. According to the ordinary rules of partnership, a person who has ceased to be a partner ceases at once to be liable to any charge whatever in respect of contracts entered into, or liabilities or debts incurred, after he has ceased to be a partner; and creditors who had contracted with the remaining members of the partnership, but had never entered into any contract with the partner who had retired, would have no right to come upon the partner who had so retired for the payment of their debts, and therefore neither his partners nor the creditors would have any right against the person so withdrawing from the partnership. Again, unless there was a distinct acceptance by the new partner, he would not be liable for the past debts of the concern. It would require some engagement on his part to make himself so liable; but, as a matter of fact, it has been the custom for persons to enter into those engagements; and therefore we cannot be surprised to find that the Legislature has made a similar arrangement with regard to these companies, and has said that the persons constituting a partnership at its demise—that is to say, when it comes to a state of failure and to be wound up—shall be considered liable for all the existing debts, inasmuch as every new partner entered into the concern with the advantage, such as it was, of possessing a share in all the assets, and might be supposed to have contracted by actual bargain, as has been done in many cases, to become responsible for all the liabilities. But it would require a very great stretch of imagination to conceive a reason why the Legislature should say that the ordinary law by which a man is liberated from his engagements when he ceases to be a member of a partnership should be altered, and that he should continue to be liable for debts and contracts over which he has no control whatsoever, and in which he has no interest whatsoever, namely, those incurred and entered into after his leaving the partnership.

Accordingly, looking back to the history of the legislation on the subject, it does not appear (with the exception of the 63rd

section of the Act of 1856: 19 & 20 Vict. c. 47), that anything more had been done by legislation previous to 1862 than giving the creditor a remedy in the shape of calls instead of the more difficult process of *scire facias*. But the rights of parties were in no way interfered with: those who had ceased to be partners were after a certain time excused from all liability, even in respect of past debts—a time, too, shorter than that prescribed by the *Statute of Limitations;* but in no case, except under the 63rd section, did the law make a person who had ceased to be a member of the partnership liable for subsequently contracted debts. [His Lordship then read the 63rd section.] In that section there is certainly a provision as to a limited company which does make a person liable to a debt though he may have ceased to be a member before the particular debt was contracted; but even that section very much strengthens the construction which I have put on the 38th section of the Act of 1862, which has no such exception whatever, but makes a man plainly liable for one year only after he has ceased to be a member in respect of debts contracted while he was a member. It was a singular result of the Act of 1856; but clearly a man who had left a concern might, under that Act, find himself liable to a considerable amount of debt incurred by the managers after he had left the company. The Act of 1862, however, avoids that result, and it is quite right and reasonable that it should do so. No creditor supposes he is contracting with a person who has ceased to have anything to do with the concern with which he is dealing, and no person who has ceased to be a shareholder in the concern supposes that he is to be made liable for that which is done by others after he has left it, and ceased to have any control over it; so that the reasonable construction is, not that this is a law passed *de novo*, giving mere arbitrary rights which the Legislature might think, apart from all ordinary course of law, to be right and proper, but that the enactment is consistent with what is recognised as right and just.

One state of things must arise, of course, upon any construction of this sub-section of the 38th section of the Act of 1862. It cannot be contended now, that if at the date of the winding-up there was no old debt existing, the past member would be liable. What difference can it make to the company that the debt has

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afterwards ceased to exist? We have in vain asked for an answer calculated to satisfy the demands of the case. Is it reasonable that the partners in the company, or the creditors of the company, should have no rights whatsoever against past members in the event of all the old debts being cleared off at the time of the winding-up, but that if there should happen to be an old debt of £1000 at the date of the winding-up, they should have such a right that it would be impossible before the call was made for the shareholders who are so liable for this £1000 among themselves to club together the sums it might be necessary to raise, and pay off that liability? Who can be reasonably said to be wronged by those persons paying off the debt which they have contracted, liberating the company from the debt altogether, and discharging themselves from all further trouble or concern with the company?

They would, in fact, be doing more than they were obliged to do, because they had a right to call on all the existing members of the company to help in paying off all the debts.

The Lord Justice *James* asked what equity the subsequent creditors could possibly have to require that this should be done. The subsequent creditors never had any right against these shareholders, unless, indeed, the statute arbitrarily gave it to them. And what right had the subsequent shareholder? So far as any unsatisfied liabilities in this company are concerned a continuing shareholder was never a party jointly contracting with the retired shareholders in any way. I think that the clear meaning of the Act is this: The creditors' right against a retiring member is limited by the statute to one year; the creditor must prove his debt within one year, or fail altogether; but during that one year the shareholder is to remain liable, and is not to be allowed to shirk out of the concern at the last moment when it is becoming bankrupt, and say he is free because no longer a shareholder. But in the case where the shareholder has gone out of the concern at the beginning of the year, and the concern has been carried on in a very reckless manner after the time he ceased to be a member, he is not to be answerable for the acts of the continuing shareholders, or be under liability to creditors who have not trusted him, but is only to be liable to contribute in respect of the debts which existed at the time of his retirement.

I do not think the difficulty as to the arrangement for distribution would be very serious, but it has not to be encountered here. All we have to encounter here is this—the debt is paid and gone; there is no debt, there is no necessity to inquire further what is to be done, there is nothing for the shareholders to contribute, for the thing towards which they were to contribute is departed; but when the necessity arises, I do not think it will be very difficult to arrive at a solution of the question as to distribution. It is a question which will at some time have to be solved, because, taking whatever view you may of the case, you must solve it in respect of each individual retired shareholder—viz., what was the amount of debt at the time that he retired?—and that, of course, may be different in respect of every shareholder, and the difficulty must be met in the best way it can be. But I do not think the difficulty is to be compared with what seems to me the monstrous injustice of making a man liable to all that has taken place after he has left the firm, and making him liable to persons with whom he has had no dealing whatever, and for the benefit of persons to whom he is under no obligation. I, therefore, think that the judgment of the Master of the Rolls is right.

Then, with regard to the costs of the winding-up, a difficulty arises because the Act speaks of contributions being made by past and present members. They are all put in one sentence, in which the Act speaks of the costs of the winding-up, and also of adjusting the rights *inter se* of the contributories. I am inclined to think that the proper construction would be, *reddendo singula singulis*, to take the contribution for costs as applicable to the present members, and not to the past members; but I do not wish to give a clear and decisive opinion upon that, because one can conceive a case in which the whole costs of the winding-up may have been incurred in respect of past debts, the partners having all backed out, and no business having been done since that time. There might be difficulty and expense in ascertaining those debts and settling them, of which all parties would have the benefit; and then the past members might say, "We have settled this at the expense of the remaining shareholders, and now we will buy up the debts and settle them as between ourselves." That will be a case to be dealt with when it arises, and it will be seen whether a proper construction consistent

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with justice cannot be arrived at. I therefore refrain from expressing any determined opinion on that point. It clearly does not arise in the present case, for the question is simply raised in order to see whether this gentleman has not to contribute indirectly, and in a roundabout manner, to the subsequent debts. I think that as the debts existing when Mr. *Brett* retired have been disposed of, there is nothing more remaining in respect of which he could be liable, or in respect of which he could be made liable.

SIR W. M. JAMES, L.J.:—

I entirely concur in the opinion of the Lord Chancellor, and in the reasoning by which he has arrived at it. I desire only to add an observation as to the 133rd section of the Act of 1862, which seems to have presented a difficulty to the mind of the Lord Justice *Giffard*. It is very singular that the 133rd section applies only to companies voluntarily wound up, and is a direction to a voluntary liquidator what he is to do, the Legislature, of course, knowing that the Court of Chancery deals with all existing rights of persons according to their rights, and does not give a preference to one or another. It is also singular that in that section the words "*pari passu*," which seem to create the difficulty, only apply to the property of the company at the time of the winding-up. [His Lordship then read the sub-sect. 1, and continued:—] That is to say, the liquidator is to take the property as he finds it only; and that is followed by the 9th sub-section, which says in effect that he is first of all to apply the property, and then, as soon as he finds it necessary, he is to call on the contributories according to their liability; but, *pari passu*, the property would be applied in payment of the liabilities of the company.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Lewis, Munns, & Longden.*

Solicitors for the Respondent: Messrs. *Harrison, Beal, & Harrison.*

KELK *v.* PEARSON.

L. JJ.
1871
March 8, 9, 23.

Light and Air—Prescription Act—Amount of Interference.

The *Prescription Act* (2 & 3 Will. 4, c. 71) has not altered the law as to the nature and extent of light to which the owner of an ancient light is entitled.

The owner of an ancient light is entitled to prevent his neighbour from obstructing the access of light, so as to render the house possessing the ancient light substantially less fit for occupation.

Decision of *Bacon*, V.C., affirmed.

G. KELK, the Plaintiff in this case, was the owner and occupier of a leasehold house called *Ness Cottage*, situate at *Notting Hill*, and built soon after the year 1829. The principal windows of the Plaintiff's house were to the north; and the Plaintiff's house had a garden to the north, bounded on the east by a wall six feet high. To the east of the Plaintiff's house and garden was open garden ground. The Defendants, in September, 1870, began to build on the garden ground to the east of the Plaintiff's house a row of houses, one of which was oblique to the east side of the Plaintiff's house, almost touching it at one end, and would, when finished, shew a dead wall about forty feet high, being higher than the roof of the Plaintiff's house. The Plaintiff, as soon as the ground was laid out for building, wrote to complain to the Defendants, who answered that they should not affect the adjoining property. Much correspondence passed, and the Defendants began to build. On the 5th of October, 1870, the Plaintiff filed his bill to restrain the Defendants from building, and from allowing the buildings to remain, so as to interfere with the access of light and air to the Plaintiff's house. The Defendants, however, proceeded with their building, and completed the side of their house.

There was contradictory evidence as to the amount of interference. The Plaintiff and his family deposed that a scullery was made quite dark, that the light to the kitchen and dining-room was materially diminished, and that the principal bed-rooms were made dark, gloomy and uncomfortable. The Defendants' witnesses deposed that the rooms in the Plaintiff's house were low

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and naturally badly lighted, all facing to the north; but that, having the garden open, they had still such an amount of exposed sky area as was seldom seen in the suburbs of *London*, and that the light was not substantially or perceptibly interfered with.

The Vice-Chancellor *Bacon* granted an injunction, and the Defendants appealed.

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for the Defendants:—

The damage is too slight to justify the interference of the Court: *Clarke* v. *Clark* (1); *Robson* v. *Whittingham* (2); *Johnson* v. *Wyatt* (3).

Moreover, the obstruction here is lateral, and the Court in such case interferes with great reluctance: *Staight* v. *Burn* (4); *Beadel* v. *Perry* (5). The rooms are sufficiently lighted for the purposes for which they are used, and the Plaintiff has no right to more than sufficient light.

Mr. *Kay*, Q.C., and Mr. *Nalder*, for the Plaintiff:—

The injury is material: *Tapling* v. *Jones* (6); *Jackson* v. *Duke of Newcastle* (7); *Yates* v. *Jack* (8). *Martin* v. *Goble* (9) is not now law. The Plaintiff has had the enjoyment of free light and air for more than twenty years, and has now an absolute right under 2 & 3 Will. 4, c. 71, ss. 3, 7: *Harbridge* v. *Warwick* (10).

The LORDS JUSTICES said that they found great difficulty in ascertaining from the evidence the amount of injury; and wished a surveyor to be agreed upon, who should report to the Court; if the parties could not agree on the surveyor, then the Court would appoint one; and the motion was to come on again as a motion for decree.

A surveyor accordingly was appointed, and made a report. The motion for decree then came on, and the surveyor was examined by the Court and by counsel for each side. The effect of his report and evidence appears in the judgments of the Lords Justices.

(1) Law Rep. 1 Ch. 16.
(2) Ibid. 442.
(3) 2 D. J. & S. 18.
(4) Law Rep. 5 Ch. 163.
(5) Ibid. 3 Eq. 465.
(6) 11 H. L. C. 290.
(7) 10 Jur. (N. S.) 688, 810.
(8) Law Rep. 1 Ch. 295.
(9) 1 Camp. 320.
(10) 3 Ex. 552.

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SIR W. M. JAMES, L.J.:—

This bill is based upon the power which is possessed by every man who has by sufficiently long use acquired a right to the access of light and air, to ask this Court in a sufficiently grave case to prevent any new building being made which will obstruct that light and air.

On the part of the Plaintiff it was argued before us that this was an absolute right—that now, under the statute 2 & 3 Will. 4, c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house; and that he could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this Court in considering whether it was a case for damages, or to be interfered with by way of injunction.

Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable.

Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree, which would be for a jury, if this were an action at law, to determine, but which it is for us, as judges of fact as well as law, to determine for ourselves as best we may, when we are determining it in Chancery.

That being the law which really appears to me to have been laid down in all the cases since the Act, whatever expressions may be found in one or the other of them comparatively enlarging or exaggerating it—that being the law, we have to apply it to this case. The Plaintiff says: "I have a house which did enjoy a considerable amount of light to several of the rooms before the Defendants

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erected this building. That light is now substantially and materially diminished and affected, so as substantially and materially to affect my comfort as an inhabitant of that house." [His Lordship then said that with regard to the Plaintiff's bedroom, which might be taken as a test room, being an important part of the dwelling-house, those who lived in the house stated that it was formerly a light and cheerful room, and that the light had been taken from it to such an extent as to make it not only less light, but to make it substantially gloomy and uncomfortable; and the scientific witnesses agreed with them in that statement. There had been also scientific evidence on the other side, and the evidence of the surveyor appointed by the Court.] I am bound to say that, as a question of fact, the evidence to my mind on behalf of the Plaintiff predominates far over the evidence, such as it is, on the part of the Defendants; and that there is in this case a material diminution of light, and such a material diminution of light as substantially to affect the comfort of the residents in the house.

With regard to the interference of this Court, I am not at all prepared to say that a good deal of what is said in *Clarke* v. *Clark* (1) is not very good sound sense, which we may have occasion to apply, that is to say, if there be the right interfered with so as to give a ground for an action at law, and an action at law which could be repeated, I think it is very fit for this Court, taking into consideration all the surrounding circumstances, to consider whether the interference of the Court will be productive of more or less inconvenience to the parties. It may be that we should interfere more readily in a case of this kind than if it had been a case of a street in *London*, where a person was employing his house for city purposes. But in this case I cannot help noticing that to the Defendants it is the mere loss of a piece of building-land, the site of one house, which they will have to convert into a garden or keep as a piece of pasture-land, instead of making it the site of a house; whereas on the part of the Plaintiff it is a very serious deprivation of the comfort of his house, and a very serious diminution of the lettable value of his house as a residence.

That being so, I have no hesitation in saying that I think it is a case in which the legal right ought to be enforced by the equitable

(1) Law Rep. 1 Ch. 16.

remedy, and that this Court ought to interfere and grant an injunction; and there must now be a mandatory order to restore that which now exists in the shape of a brick wall, or building of bricks and mortar, to the height at which it stood before the building was commenced.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I entirely agree with the opinion expressed by the Lord Justice, that the *Prescription Act*, 2 & 3 Will. 4, c. 71, has not altered the nature of the right to light and air. It has altered most materially the mode in which that right can be gained, but I am of opinion that it has not altered the right itself. Besides the words of the 3rd section, which point to the enjoyment and use of the house, there is a consideration which appears to me almost conclusive, namely, that the right to light and air at the present time by no means depends exclusively upon the statute. A right to light and air may be gained, and in many instances is gained, by implied grants from persons who were the owners of houses upon land adjoining. Before a house had been erected twenty years, or even if it had been erected twenty years, no right could be gained so long as the land on which any obstruction could be occasioned to the house was the property of the same owner; but it is perfectly settled that if the owner of a house sells land on which an obstruction might be erected, or sells the house and reserves to himself the land on which the obstruction may be erected, the right to light and air is gained by implied grant from what is called the disposition of the owner of the two tenements. It would be most inconvenient if the right to light so gained were different from the right which is gained under the statute, and I am of opinion that there is not the least reason to suppose that the Legislature intended to make those rights different.

Now, what the right to light was previously to the statute, and is still at common law, I apprehend to be perfectly well established. No doubt it is principally in Nisi Prius cases that we find the rules laid down, but they all substantially agree. The first rule stated by Mr. *Gale* (1) is, that "to maintain an action for

(1) Gale on Easements, 3rd Ed. p. 575.

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obstructing light it is sufficient to shew that the easement cannot be enjoyed in so full and ample a manner as before, or that the premises are to a sensible degree less fit for the purposes of business or occupation;" and he cites the case of *Parker* v. *Smith* (1). That was, I presume, a case where the light was used for the purposes of business. When it is used for the purposes of residence I apprehend the rule to be the same. The question is, whether the house is rendered substantially less fit for the purposes of occupation than it was before. That is the right at law.

Now, no doubt, when you come into equity, the cases appear to shew that it must be a diminution of a substantial amount of light, so as substantially to make the house less comfortable. But I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of comparison, whether by reason of deprivation of light the house is substantially less comfortable than it was before.

Much of the evidence of the scientific witnesses was given in support of what I think to be a mistaken view of the law, supposing that there is a certain quantity of light to which a man was entitled, and no more; and the witnesses seem to have made comparisons with what would be enough light in *London*, and to have considered that that was sufficient. But, in my opinion, there is no such rule.

[His Lordship then stated that the evidence shewed a substantial diminution of comfort to the Plaintiff, and expressed his opinion that the Court ought to interfere, instead of leaving the Plaintiff to bring action after action, and that it would be wrong to attempt merely to assess damages.] The Defendants had notice from the first, and all they would have been deprived of would be the ground-rent of the land.

There would be a mandatory injunction to pull the building down to the level of the Plaintiff's garden-wall.

Solicitors: Messrs. *Fladgate & Co.*; Messrs. *Lambert & Burgin.*

(1) 5 C. & P. 438.

In re QUEEN'S BENEFIT BUILDING SOCIETY.

L. JJ. 1871 May 4.

Winding-up—Benefit Building Society—Practice—Amendment of Petition at Hearing of Appeal.

Order made for winding up a benefit building society on the application of a member who had given notice of withdrawal of his deposits.
Amendment of Petition at hearing of appeal.
Order of the Master of the Rolls affirmed on amended petition.

THIS was an appeal from an order of the Master of the Rolls, dated the 20th of March, 1871, for winding up the *Queen's Benefit Building Society.* (1)

The society was governed by rules which, on the 21st of May, 1867, were certified by Mr. *Tidd Pratt* (the barrister appointed to certify the rules of savings banks) as being in conformity with 6 & 7 Will. 4, c. 32. According to these rules the members were distinguished into "investors" and "borrowers." An investor might pay in by small sums, and as soon as his deposits amounted to £1 they were to carry compound interest, which was carried to the investor's credit till the amount reached £10; this completed a share, on which the investor was to receive interest. An investor was not compelled to make deposits at fixed periods, and he was at liberty to withdraw, by giving one month's notice, the amount standing to his credit in the books of the society. "Borrowers" could obtain, on security, advances from the society, repayable by instalments.

The society, owing to circumstances which need not be stated, had fallen into such circumstances that it was impossible for it to go on. A Mr. *Gamble*, in March, 1871, presented a Petition for winding it up, the allegations of his title so to do being, "Your Petitioner advanced to the said society a large sum of money, a part of which was repaid to your Petitioner in October, 1870, but a balance of £75 was left still owing to him. Your Petitioner, on the 25th of October last, and on other dates, wrote and sent letters to the said society requiring payment of the said balance of £75 due to him as aforesaid, but has been unable to obtain payment of the same; and the whole of the said sum of

(1) See W.N. (1871) 64.

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In re Queen's Benefit Building Society.

£75 is now due and owing to your Petitioner by the said society, together with some interest thereon."

From the evidence in support of the Petition, it appeared that Mr. *Gamble* was an "investor," who, in September, 1870, gave notice of withdrawal of his deposits. The moneys which the Petition stated him to have advanced to the society were the sums he had so deposited, and the £75 was the balance of which he had been unable to obtain the repayment. The society supported the Petition, and on the 20th of March, 1871, the Master of the Rolls made an order for winding-up, which was expressed to be "upon the Petition of *S. Gamble*, a creditor of the society." The making this order was opposed by a Mr. *Turner*, who alleged himself to be a member of the society, and now presented an appeal petition against the order, alleging himself to be a member and contributory of the society, but not stating in respect of how many shares. An affidavit was filed in opposition, stating that he was not a member, except that he was indebted to the society for money lent to him.

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the Appellant:—

[Mr. *Swanston*, Q.C., for *Gamble*, took the preliminary objection that the Appellant was not a member, and had no *locus standi*.

The appeal ultimately was allowed to proceed on the Appellant's admitting, by his counsel, that he was a contributory in respect of sixty shares.]

The only evidence that can be received on the winding-up petition is evidence of the facts stated in it, and the case cannot be supported on evidence of a different state of facts. The Petitioner came to the Court as a creditor, and must have relief as a creditor or not at all: *In re Spence's Patent Cement Company* (1). The Petitioner alleges a debt, founded on a loan, which is bad, for the society had no power to borrow: *In re National Permanent Benefit Building Society* (2). Even if the rules had purported to authorize unlimited borrowing, it would have been void: *In re Victoria, &c., Land Society* (3); *Laing* v. *Reed* (4).

(1) Law Rep. 9 Eq. 9.
(2) Ibid. 5 Ch. 309.
(3) Law Rep. 9 Eq. 605.
(4) Ibid. 5 Ch. 4.

[THEIR LORDSHIPS expressed some doubt as to how a society of this kind could be wound up.]

There is great force in the arguments against such a winding-up; but *In re Doncaster Permanent Building Society* (1) is considered to have settled that it may take place.

Mr. *Waller*, for the society, and Mr. *Robinson*, for one of the directors.

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings*, for *Gamble*, were proceeding to refer to *Re St. George's Building Society* (2) and *In re Midland Counties Benefit Building Society* (3), when the Court asked them whether they were willing to amend their Petition by stating that the Petitioner was a creditor only in respect of money advanced by him as a member. This question having been answered in the affirmative, their Lordships made the following order:—

The Petitioner, *S. Gamble*, by his counsel, undertaking to amend his Petition, on which the order of the 20th of March, 1871, was made, for which leave is hereby given, by stating that he was a creditor of the said company in respect of money advanced by him as a member, and in respect of which notice for withdrawal had been given, Affirm the order on the Petition as amended, and dismiss the appeal petition with costs.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *Harper, Broad, & Battcock.*

(1) Law Rep. 3 Eq. 158. (2) 4 Drew. 154. 3 Jur. N.S. 683.
(3) 13 W. R. 399.

L. JJ.
1871
May 8.

In re GENERAL EXCHANGE BANK.
In re LEWIS.

Bank—Lien on Shares—Sale of Assets.

By the articles of association of a bank, the bank would have a lien on the shares of a shareholder for all moneys due to the bank by the shareholder. The bank was wound up, and the assets were sold, one of the terms being that certain shareholders in the bank should be paid £2 a share:—

Held, that the bank had, on the money so to be paid to a shareholder, a lien for moneys due to the bank by the shareholder.

Order of the Master of the Rolls reversed.

By the 13th of the articles of association of the *London, Hamburg, and Continental Exchange Bank, Limited*, it was provided that "The company shall have a first and permanent lien on all shares of any member for all moneys due to the company from him alone, or jointly with any other person," and by Art. 20 the company might decline to register any transfer of shares whilst the member making the same was indebted to the company.

On the 25th of March, 1865, an order was made for winding up the *London and Hamburg Bank*, and an official liquidator was appointed. On the 22nd of June, 1865, an agreement was, with the sanction of the Master of the Rolls, made between the official liquidator and a bank called the *General Exchange Bank*, whereby the liquidator agreed to sell to the *General Exchange Bank* all the business and property of the *London and Hamburg Bank*. And it was agreed that the shareholders in the *London and Hamburg Bank* were entitled to subscribe 10,000 shares in the *General Exchange Bank* credited with £8 per share, being an exchange of two £50 shares, £8 paid, for one £100 share £25 paid; and that, should the assets of the former bank not realise the sum to be credited, the deficiency was to be made up by such shareholders. It was also provided that the *General Exchange Bank* should within twelve months pay to each shareholder of the *London and Hamburg Bank* who should not in respect of his share or shares subscribe within fourteen days after notice given for shares in the *General Exchange Bank* as therein mentioned the sum of £2 in

respect of each share held by such shareholder in the *London and Hamburg Bank*.

Mr. *D. L. Lewis* held 605 shares in the *London and Hamburg Bank*, and was also indebted to the bank in an amount exceeding £1210. Before the order to wind up that bank was made he had executed a deed of inspectorship, by which he agreed to assign all his property to inspectors.

The *General Exchange Bank* was afterwards wound up, and the official liquidator of the *London and Hamburg Bank* applied by summons in that winding-up that the administratrix of *D. L. Lewis*, who was dead, might be ordered to concur, and that the liquidators of the *General Exchange Bank* might be ordered, with such concurrence, to pay to the liquidator of the *London and Hamburg Bank* the sum of £1210, being the amount of £2 per share upon the 605 shares held by *D. L. Lewis* in the *London and Hamburg Bank*.

The Master of the Rolls refused to order payment (1), and the liquidator of the *London and Hamburg Bank* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Graham Hastings*, for the *London and Hamburg Bank*:—

We claim a lien on this money as representing the shares. It is clear that we had a lien on the shares, and *Lewis* could not have assigned or dealt with them on any other footing. No shareholder could take the money for the shares without discharging his liabilities to the bank, and the inspectors cannot be in a better

(1) 1871. March 11.

LORD ROMILLY, M.R., after stating the facts of the case, said that it was quite clear that this £1210, if *D. L. Lewis* elected to take it, was no part of the assets of either company. It became the property of *D. L. Lewis*, and formed part of his estate. The lien of the *London and Hamburg Bank* upon these shares did not extend to the sum which was to be paid in lieu of shares. He was at full liberty to take the money and dispose of it as he thought fit, and the *London and Hamburg Bank* could not, in the slightest degree, interfere with it; they had only the same remedy against him as against any other debtor. It had been argued that the inspectors could not claim the money because there had been no actual assignment by *Lewis* of the property; but that did not assist the bank as claimants. Probably it would go to the administratrix, and be applied in payment of *Lewis'* debts, and the bank might then claim their share, but they were not entitled to have the money paid to them as part of the assets of the bank.

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position than the shareholder. The bank had clearly a charge on the shares, and the charge is now transferred to the money. It is just as if the assets had been realised, and £2 a share was to be returned: *Small* v. *Moates* (1).

Mr. *Waller*, for the administratrix of *D. L. Lewis*.

Sir *R. Baggallay*, Q.C., and Mr. *G. W. Lawrance*, for the *General Exchange Bank*.

Mr. *Lindley* (Mr. *Jessel*, Q.C. with him), for the inspectors under *Lewis'* deed of inspectorship:—

The question is, what was the bargain between the shareholders and the *London and Hamburg Bank*. The money is not substituted for the shares. *Lewis* would not have got the money unless he had been a shareholder, but that is all. The shares are gone. If the *London and Hamburg Bank* had meant to retain their lien they should have made a provision to that effect in their agreement when they agreed to hand over the assets to the *General Exchange Bank*. If *Lewis* had deposited these shares with any other banker, and that banker had made an agreement with any other company that the shareholder should receive £2 for each share, the shareholder would receive the £2.

Sir W. M. James, L.J.:—

I am of opinion that the substance of this case was the sale of these shares for £2; that is to say, in the winding-up, instead of realising the assets, and taking what there would have been after all the assets were sold and all the claims were satisfied, the liquidator came to a reasonable arrangement by which £2 per share was to be paid, as being the value of the shares of those persons who did not choose to go on with the new speculation. That is exactly the same thing for all purposes as if £2 had been ascertained in the winding-up, or as the result of the winding-up, to be the sum ultimately payable on each share. That sum represents the shares, and, as it appears to me, is subject to any trust which the owner of the shares created, and would be subject to any charge

(1) 9 Bing. 574.

which he had created expressly in favour of any creditor. And it does not appear to me less subject to the charge because the person or association in favour of whom the charge is expressly created is the company itself in which the share existed. I am of opinion that the charge created by express contract between the parties extends to that which is the purchase-money of the shares. Therefore, the order of the Master of the Rolls must be discharged.

Sir G. Mellish, L.J.:—

I am of the same opinion. The first question is, whether this 13th article gives a mere right to hold the shares, or amounts to an equitable charge on the shares for any moneys due from the shareholders to the company. The words are:—[His Lordship read the 13th article.] I cannot help thinking that those words are perfectly sufficient to constitute an equitable charge on the shares. That being so, I am clearly of opinion that the 160th and 162nd sections of the *Companies Act*, 1862, which, after an order for winding up has been made, authorize the entire sale of the assets of one company to another company, simply prescribe a mode of realising the assets of the selling company. It may be a part of the bargain that shares in another company shall be taken, and if so, each shareholder is to consent; it may be part of the bargain that he is to receive a sum of money for each share, and if so, the shareholder is to consent to that; if he does not consent he may dissent, and then the value of his shares is to be estimated either by agreement or by arbitration. But in whichever way it is done, the company to which he belongs being wound up, his shares as shares necessarily cease to exist, and he receives the surplus assets which belong to the shares and represent them. It appears to me that the case is exactly the same as if the liquidator, instead of selling all the assets to one company, had realised the assets in the best way he could, and had then found that there was £2 per share for each shareholder to receive; but that £2 would be subject to every equitable charge which existed on the shares. I cannot think that the *London and Hamburg Bank* have given up that right by the agreement they have made, which is simply an agreement between the two companies. I think it would have been wrong and inconvenient if they had

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entered into any question between themselves and their own shareholders, or into any question respecting any charges they might have on such shares. They, I think, properly confined the agreement to an agreement between the two companies, and there was no more necessity for mentioning a charge which they themselves might have, than there would have been for mentioning any charge created by the shareholder himself, and held by any other bank or anybody else. I am of opinion that the *London and Hamburg Bank* are entitled to the £2 a share.

Solicitors: Messrs. *Deane & Chubb;* Messrs. *Lawrance, Plews, & Co.*

L. JJ. 1871 *July* 25.

In re RIVER STEAMER COMPANY.

MITCHELL'S CLAIM.

Statute of Limitations—21 *Jac.* 1, *c.* 16—9 *Geo.* 4, *c.* 14—*Acknowledgment*—*Promise to pay*—*Letter written "without prejudice."*

M. agreed with a company to build for them, at specified prices, certain ships, to be delivered at certain times, and to be paid for by certain instalments. In case of delay in delivery of the ships, certain fortnightly sums were to be paid as liquidated damages, and the company were to be at liberty to deduct them from the unpaid purchase-money. The agreement contained a provision for referring all disputes to arbitration. The ships having been supplied, *M.*, who had received some instalments, sent in at the end of 1861 an account, shewing the final balance which he claimed. The company insisted that he was liable to deductions for delay to an amount exceeding this balance, and that nothing was due to him. A correspondence ensued, and the company proposed, pursuant to the stipulations of the contract, to refer the dispute to arbitration; and in 1863, a draft reference having been approved, they named an arbitrator on their part, but *M.* would not name one on his. On the 19th of February, 1867, the managing director wrote to *M.* saying that *M.*'s account omitted all the deductions to which the company were entitled, and which would leave the balance in their favour, but that they were still willing to have all questions decided by arbitration, according to the contract, and called on *M.* to concur in referring them. This letter was expressed to be "without prejudice." *M.* did not answer this letter, nor take any steps to proceed to arbitration. A petition to wind up the company was presented in October, 1869, and an order made. *M.* claimed to prove for his balance, which was resisted, on the ground of the *Statute of Limitations*:—

Held (reversing the decision of *Bacon*, V.C.), that the above letter did not

contain an acknowledgment taking the case out of the *Statute of Limitations*, for that—

(1) It did not contain any admission of a debt, since under the contract the liquidated damages were a deduction from the price, and not merely matter of set-off; and, *semble*, even the admission of a debt, if coupled with a claim to a set-off of larger amount, would not take a case out of the statute, as no promise to pay could be implied from it.

(2) Nor did it contain any unconditional promise to pay.

(3) Nor did it contain any promise to pay upon a condition which had since been performed; for on its fair construction it contained at most only a promise to pay what should be found due on an arbitration under the contract, if *M.* named an arbitrator within a reasonable time, which he had not done.

Semble, that as the letter was expressed to be without prejudice, and the proposal contained in it was not accepted, it could not be used against the writer.

THIS was an appeal by the official liquidator of the *River Steamer Company, Limited*, from a decision of Vice-Chancellor *Bacon*, disallowing a defence, grounded on the *Statute of Limitations*, to a claim by *Charles Mitchell* to prove as a creditor of the company.

Mitchell, who was a shipbuilder, had, on the 12th of June, 1860, agreed with the company to build for them three iron steamers, with engines and boilers complete, and three iron barges, according to a specification. The agreement provided for the delivery of the several vessels and engines to the company at the times therein specified, reaching from the 15th of August, 1860, to the 15th of March, 1861, and for the payment of the price by instalments, according to the progress of the work, the final instalment in respect of each vessel to be payable on its shipment in *London* or *Liverpool*. It also contained a provision for payment by *Mitchell* of heavy sums by way of liquidated damages for every fifteen days by which the delivery of any of the articles should be delayed beyond the times specified for their respective delivery, such damages to be retained out of the unpaid purchase-money; and a clause for referring all disputes to the arbitration of three arbitrators, one to be chosen by each party and the third by the two first chosen, with the common power to either party to appoint a second arbitrator if the other party should neglect to do so.

Some alterations were afterwards made in the specification, and in the times fixed for delivery. The vessels and engines were all made and delivered before the end of 1861, and at the end of that

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year *Mitchell* claimed a large sum from the company as the balance due to him. The company claimed various deductions, and alleged that large sums were due to them for *Mitchell's* failure to deliver the vessels and engines at the appointed times. A long correspondence took place, and in March, 1863, a draft reference to arbitration was settled and approved. The company, in June, 1863, named an arbitrator on their part, but *Mitchell* did not name one; the company did not exercise the power of naming a second, and no reference took place, nor was any payment made to *Mitchell* by the company. On the 19th of October, 1869, a petition to wind up the company was presented, and on the 8th of November a winding-up order was made. On the 30th of March, 1870, *Mitchell* carried in his claim, amounting to more than £10,000, which was resisted on the ground that it was barred by the *Statute of Limitations*. In opposition to this, *Mitchell* contended that there had been an acknowledgment in writing sufficient to take the case out of the statute.

The letters relied on as having this effect were the following:— On the 15th of June, 1864, the company's solicitors wrote to *Mitchell's* solicitors as follows: "We find that we have long since named an arbitrator. You then proposed to let one arbitrator act for both sides; and we were willing to allow the arbitrator we had originally named to act alone. He is a man of the first position, and we need not say wholly unconnected with the parties in the case, on which he has never been in the remotest manner consulted. The final arrangements for the reference therefore rest, and have long rested, with you." On the 19th of February, 1867, the managing director wrote to *Mitchell:* "I am directed by the board of this company to inform you that a paper has been received at this office without letter or explanation of any kind, purporting to be a memorandum of account between you and this company, which is altogether incorrect, both in principle and detail, omitting all deductions and credits to which this company are entitled, and which would leave the balance considerably in their favour. I am, however, authorized to say that this company are still willing, as they have all along been, to have all accounts and questions between you and them decided by arbitration, according to your contract, and they again call upon you to concur with them in

the necessary steps for that purpose. They have long since named an arbitrator on their part, but they could not get you to do what was necessary on yours, and the reference was never therefore proceeded with. This, of course, is wholly without prejudice." *Mitchell* never answered this letter.

Vice-Chancellor *Bacon* held that the case was taken out of the statute, and gave leave to *Mitchell* to go in and prove his claim (1). The official liquidator appealed.

(1) 1871. April 28. W.N. (1871) 93

SIR JAMES BACON, V.C. :—

The only objection to this claim has been raised upon the *Statute of Limitations*, which requires an acknowledgment of a debt in the terms of the statute; and I find in this case an acknowledgment as distinct as words can express it. The case is extremely simple. A contractor agrees to perform a very extensive contract for the company now being wound up, and of course they became indebted to him in consequence. When he asks for payment, it is suggested that they have a counter claim against him. Then comes a correspondence, and a draft agreement of reference is prepared; not any new agreement of reference, as in *Hales* v. *Stevenson* (9 Jur. (N.S.) 300); not a collateral agreement to settle some dispute that had arisen between the parties, but in pursuance of the original contract an agreement for reference is prepared; and then, owing to a difference of opinion which existed between the parties as to the nomination of an arbitrator, nothing was done upon it. But at no period have the company disputed the claim made by Mr. *Mitchell* on the company, and if it is said that is not enough, then, having regard to the facts which are proved in the correspondence, which I need not go through again, comes the letter of February, 1867, long within the statutory period, which, in my opinion, puts the case beyond the possibility of doubt as to the application of the statute. It is in these terms, and it is a letter written by the managing director: "I am directed by the board of this company to inform you that a paper has been received at this office, written without letter or explanation of any kind, purporting to be a memorandum of account between you and this company, which is altogether incorrect, both in principle and detail, omitting all deductions and credits to which this company are entitled." That is the single objection which is raised. They say nothing against the account but that it omits "all deductions and credits to which this company are entitled, which would leave the balance considerably in their favour." Now what is the meaning of that word "balance"? A plain acknowledgment that a debt exists from them to *Mitchell*, and as plain an assertion that a claim may be made by them against *Mitchell* which would leave a balance considerably in their favour. A balance of what? Unless there is a debt acknowledged to exist, and a set-off claimed, there can be no balance. The letter proceeds: "I am authorized to say that this company are still willing, as they have all along been, to have all accounts and questions between you and them decided by arbitration according to your contract." I find, therefore, that the acknowledgment is complete and perfect. There have been, no

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Mr. *Bagshawe* (Mr. *John Day* with him), for the Appellant, referred to *Tanner* v. *Smart* (1), *Everett* v. *Robertson* (2), *Swann* v. *Sowell* (3), *Colledge* v. *Horn* (4), and *Hales* v. *Stevenson* (5).

Mr. *Little*, Q.C., and Mr. *W. Pearson*, in support of the order:—

There are two grounds for maintaining this order: first, that on the letters there is a sufficient admission of a debt; secondly, that under the provisions of the contract there is a right to have the reference to arbitration prosecuted. This, however, could not now be done without the leave of the Court; and the Court having the power of doing complete justice, will not allow arbitration, but will decide the matter itself.

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doubt, a great many disputes between the parties in the course of the correspondence referred to, since the contract was completed; but there is one subject upon which they have never differed. Mr. *Mitchell*, they say, had a claim against them for having completed his contract, and they had a claim against him, which would neutralise his demand, and, as they say, leave a balance in their favour.

The cases which have been referred to, in my opinion, with one exception, have no application to the present case. It is not like the case of *Colledge* v. *Horn* (3 Bing. 119); the facts are not the same, and the principle on which the decision must rest is not the same. *Hales* v. *Stevenson*, which has been referred to, and most strongly relied upon, was a case of a demand made after the statute had run. When the demand was made, a collateral agreement was entered into that there should be a reference to ascertain whether anything was due or not. There is no acknowledgment that anything is due, but an agreement to refer; and that agreement having become abortive, either by the death of the arbitrator or for some other reason, it was held insufficient to revive the Plaintiff's claim upon the original contract which the statute had barred.

Is there any kind of resemblance between that case and this, or any principle in that case which can by any possibility be applied to the present? I find no fault with the good faith of either party, and all that has been done on both sides is, that Mr. *Mitchell* has insisted upon his demand, and the company have insisted upon their right to have their claim allowed or ascertained by means of an arbitration. What could Mr. *Mitchell* do in the face of that agreement? He could not bring an action for the sum said to be due to him, because they were entitled to a set-off, and that could only be ascertained by means of the arbitration.

It would not only be directly contrary to justice and good sense, but directly opposed to the plain law of the case, if the *Statute of Limitations* were now resorted to by this company to get rid

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(1) 6 B. & C. 603.
(2) 1 E. & E. 16.
(3) 2 B. & A. 759.
(4) 3 Bing. 119.
(5) 9 Jur. (N. S.) 300; 11 W. R. 33.

[The Lord Justice James:—How could the Court make you pay, if it turned out that the balance was against you?]

Under sect. 87 of the *Companies Act*, 1862, the Court can impose terms. The letters throughout admit that there was an unsettled account, and that is all that is necessary. It is not necessary to have an acknowledgment that there is a balance due: *Prance* v. *Sympson* (1); *Leland* v. *Murphy* (2); *Sidwell* v. *Mason* (3). Then the agreement to refer to arbitration contained in the letter amounts to a sufficient acknowledgment: *Cheslyn* v. *Dalby* (4). Moreover, when the winding-up order was made, there was an existing reference to arbitration capable of being enforced at law.

[The Lord Justice Mellish:—Do you mean that where there is an agreement to refer disputes to arbitration the statute does not run?]

No; but here the proceedings were in such a state that a Court of Law would have appointed an arbitrator.

[The Lord Justice Mellish:—Suppose it had; if the arbitrator found your claim barred by the statute, he would be bound to disallow it.]

The words "without prejudice" only mean without prejudice to any questions of right then in dispute between the parties.

The Lord Justice James:—Does not "without prejudice" mean, "I make you an offer; if you do not accept it, this letter is not to be used against me"?

Sir G. Mellish, L.J.:—

This claim is substantially a claim by Mr. *Mitchell* for the price of certain ships sold by him to the company, and the question is, whether the claim is barred by the *Statute of Limitations*. It is admitted that more than six years have elapsed since the ships

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of a demand so plain, and so plainly acknowledged by them to a certain extent, under the facts as they here occur.

I am of opinion, therefore, that Mr. *Mitchell* is at liberty, notwithstanding the statute, to go in under this winding-up order to make such claim as he can establish; and I refer the matter back to Chambers, with a declaration that the claim is not barred by the *Statute of Limitations*. There will be no order as to costs.

(1) Kay, 678.
(2) 16 Ir. Ch. 500.
(3) 2 H. & N. 306.
(4) 4 Y. & C. Ex. 238.

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were delivered and the claim accrued; but it is said that there are letters containing an admission sufficient, under 9 Geo. 4, c. 14, to take the case out of the statute.

Now, it is perfectly settled law what is the description of letters which will take a case out of the statute. I will read what is laid down by Chief Justice *Jervis* on the subject, in his book called *Jervis's* New Rules (1), which, in my early days at the bar, we were constantly in the habit of quoting, and I find this passage, cited with approbation by Lord *Campbell* and Mr. Justice *Wightman* in *Everett* v. *Robertson* (2): "Before this statute" (that is, 9 Geo. 4, c. 14), "not only a verbal promise to pay a debt more than six years old, but a bare unconditional acknowledgment of its subsistence, made within six years before action brought, had been held sufficient to take this case out of the statute 21 Jac. c. 16, s. 3. But now, in order to revive the liability of the debtor after the expiration of the six years by subsequent acknowledgment or promise, there must be a proof of some writing, signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily to be implied. If, therefore, the writer, although he admits the existence of a debt, refuses to pay it, or reserves the matter for future consideration, or refers the creditor to some third person for payment, or the like, this will not be sufficient to prevent the operation of the statute." That being the rule, there must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed.

Now, the nature of the present case is this: The claim was under a contract for the building of these ships, and the contract contained a clause by which, if the steamers, engines, boilers, and barges respectively should not be furnished, or shipped, or ready for shipment in *London* or *Liverpool*, on or before the several times stipulated, the builder was to pay to the company an agreed compensation for every fifteen days' delay in the delivery, which compensation was to be liquidated damages, and not in the nature

(1) Page 350, n. (a). (2) 1 E. & E. 16.

of a penalty, and might be deducted and retained out of any then unpaid instalments of the purchase-moneys. Then there was a further clause for reference to arbitration of all disputes arising under the contract. After the ships had been delivered a claim was made for the price, and the company at once set up as an answer that the ships had not been delivered by the time specified, that certain sums had become due under that clause which they were entitled to deduct, and they throughout insisted that these sums exceeded the balance of the purchase-money, and that, therefore, nothing remained due. The builder controverted this, and that was the substantial dispute between them. Then a correspondence went on, and the company insisted, as they were perfectly entitled to insist, that the matter should be decided by arbitration, because it is quite clear that, if an action had been brought, the company being ready and willing to refer it to arbitration, that action would have been stopped under the *Common Law Procedure Act.* The company were perfectly willing to have the matter referred to arbitration—indeed they went so far as to appoint an arbitrator, and they, in writing, required the builder to appoint another arbitrator. He did not choose to do it; the company did what they were perfectly entitled to do, they appointed a barrister as their arbitrator. The builder said, "I will only have a mercantile arbitration, and therefore I will not appoint another arbitrator." Time goes on until a period of six years has elapsed, and then there are two letters, which are relied upon as containing a promise sufficient to take the case out of the statute:—[His Lordship read the two letters, which are set out above.]

Now, the question is, does either of those two letters take the case out of the statute? First of all, beyond all question they do not contain an admission of any debt; on the contrary, it appears to me that they deny that there was any debt. The Vice-Chancellor appears to have thought that they amounted to saying, "We admit we owe you a debt, but we have a set-off, which is sufficient to countervail it. Now, even if they did amount to that, I do not think that this would be sufficient to take the case out of the statute; for I think that such an admission would not be one from which a promise to pay could be implied. It is not the admission which takes a case out of the statute, but the promise to pay, which is implied from an unconditional admission. But when we look

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at the terms of this agreement, which provides that the sums payable on account of delay shall be liquidated damages, and authorizes the company to deduct them from the unpaid balance of purchase-money, it is quite clear that the letters amount to a denial of the debt. The case is not one of set-off, nor would the company raise their defence by a plea of set-off. If the sums payable for delay became due prior to the time when the instalments became due (and I should rather suppose they did become due before the last of the instalments became payable), then the company would simply raise their defence under a plea of "never indebted." If, on the other hand, these sums did not become due before the instalments became payable, then, although, no doubt, the defence must be specially pleaded, the plea would not be a plea of set-off, but a plea that, under the terms of the contract, and in the events which had happened, they were not liable to pay anything. It therefore appears to me to be quite clear that these letters do not contain any admission of a debt.

Then, secondly, do they contain any unconditional promise to pay? It appears equally clear to my mind that they do not; for, denying that there was a debt, they plainly mean to say, "We do not consider ourselves liable to pay anything." But do they contain a conditional promise to pay? and if so, what is it? The only conditional promise to pay that can be alleged is a promise to pay the sum which the arbitrators, on a reference under the contract, might find to be due; and it appears to me clear that no further promise can possibly be implied. The company do not mean to promise to pay any sum which a Court of Law or Equity may find to be due, or any sums which may be found due otherwise than by arbitration. By the terms of the contract they were entitled to insist that their claim should be decided by arbitration, and by arbitration only; and they apparently were always willing to have an arbitration. It was entirely the fault of Mr. *Mitchell* that, during all this long period of years, no arbitration was ever had, and the matter never came to be decided.

Construing these letters fairly, the real question to be determined, as it appears to me, is, do they amount to an unconditional promise to pay anything which may be found due on an arbitration, so as, in fact, to give Mr. *Mitchell* six years from the time of the writing of each of those letters respectively for him to appoint

an arbitrator? or do they mean, "If you will appoint an arbitrator within any reasonable time, then we will go on to arbitration; and if the arbitrators find against us, we will pay what may be found due by the arbitration"?

Now, it appears to me that, construing these letters fairly, they certainly only mean this: "The time for performing our promises to refer this matter to arbitration has long passed" (a proposition which, I think, was quite correct); "but we will waive that, and if you will at once, or within a reasonable time, proceed to arbitration, we are still willing, as we have all along been, to have all the accounts as between you and us decided by arbitration, according to your contract." Now, what was the contract? The contract was, that within twenty-one days after the nomination of an arbitrator by one party, the other party should name one. The company have, no doubt, under the terms of the clause, a power, if they please, to appoint a second arbitrator themselves; but they did not choose to avail themselves of that; and I think they were perfectly entitled to say they would not avail themselves of it, for a reference to arbitrators chosen only by one party is not a fair way of deciding a question. Therefore they did not attempt to do that; but they say, "If you will now come in, and, according to your contract, appoint an arbitrator, we will go on with the arbitration." No answer is given to that letter, and the winding-up does not take place until October, 1869—that is to say, more than two years afterwards. Then, was not the reasonable time for Mr. *Mitchell's* appointing an arbitrator gone? Was there any promise to pay what an arbitrator might find if he was not appointed until two and a half years had elapsed? It appears to me that it would not be giving a fair and proper construction to that letter to say that it contains any such promise; and if it contains a promise to pay at all, it is a promise to pay on a condition which, as it appears to me, has never been performed.

As to the letter of the 19th of February, there is this further objection, that it is stated to be without prejudice. I am strongly of opinion, although it is not necessary to decide it in this case, that a letter which is stated to be without prejudice cannot be relied upon to take a case out of the *Statute of Limitations*, for it cannot do so unless it can be relied upon as a new contract. Now,

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if a man says his letter is without prejudice, that is tantamount to saying, "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all." It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted.

A variety of cases have been cited; but, in my opinion, every one of them is perfectly within the rule laid down by Lord Chief Justice *Jervis*, to which I have referred. The case most relied upon was *Prance* v. *Sympson* (1). There the Vice-Chancellor, as it appears to me, acted strictly in accordance with the rule. That was a case of taking an account which could only be taken in a Court of Equity; and there was a letter admitting that the account must be taken, and that there was a right to have it taken. From that the Vice-Chancellor inferred that there was a promise to pay what might be found due on the taking of that account; just as here we might infer, from the promise to refer to arbitration, a promise to pay what the arbitrators might have found due if the arbitration had taken place. With that all the other authorities are perfectly consistent. Of course a variety of cases may be cited, and questions may be raised whether they properly apply to the rules which have been laid down. But the rules are, I apprehend, perfectly clear and perfectly settled. There must either be an admission of the debt, from which a promise to pay may be implied, or an absolute promise to pay, or a promise to pay upon a condition which is proved to have been performed. There is in these letters at the most, in my opinion, a promise to pay upon a condition which has not been performed. Therefore, in my judgment, the case is not taken out of the statute, and the company are entitled to the benefit of it.

Sir W. M. James, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Parker & Clarke;* Messrs. *Symes, Sandilands, & Humphry.*

(1) Kay, 678.

VERNON *v.* VERNON.

L. JJ.
1871
July 25.

Practice—Amendment—Time—Cons. Ord. XXXVII. r. 18.

A demurrer having been filed to a bill, the Plaintiff served, in due time, an order of course for leave to amend. Two days before the expiration of the time for amending he served a summons for further time to amend, returnable the day after such expiration:—

Held (affirming the decision of *Bacon*, V.C.), that, as the summons was not returnable till after the expiration of the time originally allowed to amend, the application was too late, there being no special circumstances to induce the Court to depart from the rule laid down by Cons. Ord. XXXVII. r. 18.

THIS was a motion by the Plaintiff by way of appeal from a decision of Vice-Chancellor *Bacon*, who had refused him leave to amend his bill.

The bill was served on the 15th of September, 1870, and on the 23rd the Defendant entered an appearance. Interrogatories were served on the following day. On the 5th of October the Defendant filed a demurrer to the whole bill for want of equity. On the 9th of November, the last day of the time allowed for setting down the demurrer, the Plaintiff obtained and served the common order of course for leave to amend his bill on payment of 20*s.* costs. On the 21st of November, the bill not having been amended, the Plaintiff took out a summons returnable on the 24th, that he might be at liberty to amend his bill as he might be advised. On the 23rd the fourteen days allowed for amending expired. On the 24th the parties attended before the Chief Clerk, who intimated that he could not grant the application, but, at the Plaintiff's desire, adjourned it into Court, with liberty to amend the summons; which accordingly was amended by making it a summons for leave to amend notwithstanding the order of the 9th of November, and notwithstanding the Plaintiff's submission to the demurrer, and notwithstanding the expiration of the time for amendment allowed by the order of the 9th of November. Vice-Chancellor *Bacon* held that the application, not being made till the 24th of November, after the time for amending limited by the previous order had expired, was too late, and refused it with costs.

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Mr. *Eddis*, Q.C., and Mr. *Terrell*, for the Appellant:—

We served an order to amend within the time limited by Cons. Ord. XIV. r. 14, so the bill is not gone. We, however, failed to amend in time; but the only effect of that is defined by Cons. Ord. IX. r. 24, and the bill still is not gone. *Nicholson* v. *Peile* (1) is in our favour.

[The LORD JUSTICE JAMES:—That case was not under the present Orders.]

Cons. Ord. XXXVII. r. 17, preserves the power of the Court as to time. Notwithstanding Cons. Ord. XXXVII. r. 18, the time may be enlarged after its expiration: *Southampton, &c., Steamboat Company* v. *Rawlins* (2).

Mr. *Kay*, Q.C., and Mr. *Speed, contrà*, were not called upon.

SIR W. M. JAMES, L.J.:—

I do not say that the Court might not have authority to grant such an application as the present if sufficient ground were laid for it. The loss of a few days is sometimes of vital importance, and if the refusal of leave to amend would seriously alter the position of the parties, it would be our duty carefully to consider whether the Court has not power to do what is asked. The present, however, is not a case where the Court would be disposed to go beyond the words of the orders. If the suit cannot proceed on the present bill without an amendment, the Plaintiff has only to file a fresh bill; and he sustains little more damage than the expense of setting up afresh the type of a bill of no great length. Under Cons. Ord. XXXVII. r. 18, it is clear that, as a general rule, an extension of time must be applied for before the expiration of the original time, and this is not a case for departing from the general rule.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *C. P. Pritchard*; Messrs. *Tucker & Lake*.

(1) 2 Beav. 497. (2) 13 W. R. 512.

Ex parte MELBOURN. *In re* MELBOURN.

L. JJ.
1871
July 27.

Bankruptcy—Joint and separate Creditors—Conflict of Interest—Appointment of Inspectors.

One member of a firm was adjudicated bankrupt under the Act of 1861, the others being out of the jurisdiction, and there was no joint adjudication. The joint creditors proved debts to many times the amount of the separate debts, and appointed as assignees one joint creditor and the nominee of another. Separate estate was got in to an amount sufficient for payment of a large dividend on the separate debts; but no joint estate had been got in. A separate creditor, with the assent of nearly all the other separate creditors, applied for an order that a meeting of separate creditors might be held for appointing an inspector to protect their interests:—

Held, that the Acts of 1849 and 1861 had not taken away the power of appointing such an inspector, and that the separate creditors ought to be at liberty to appoint one; but that he must not take any steps without the sanction of the Registrar.

THIS was an appeal motion by *Eliza Melbourn*, the widow and a separate creditor of the bankrupt, from an order of Mr. Registrar *Spring Rice*, who, sitting for the Chief Judge, had refused a motion made on her behalf that a meeting of separate creditors might be held, and that such separate creditors might be at liberty to appoint one or more inspector or inspectors of the separate estate of the bankrupt, for the purpose of protecting the interests of his separate creditors.

George Melbourn had carried on business at *Batavia* and in *England*, in partnership with *Lichtenburgh* and *Tolson*, both of whom were out of the jurisdiction, and *Melbourn* was adjudicated bankrupt alone. The 5th of May, 1869, was the day appointed for the choice of assignees, and on that day four creditors of the firm proved debts amounting in the whole to more than £89,000. The debts of the separate creditors, as entered in the bankrupt's accounts, amounted to £1622, and little more than half that amount was proved. The joint creditors, therefore, had the entire control over the choice of assignees, and appointed a creditor for £8000, and a nominee of a creditor for £80,000.

At this meeting, Mrs. *Melbourn* tendered a proof against the separate estate for £6250 under an ante-nuptial contract. This

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proof was rejected by the Registrar; but on the 11th of November, 1870, the decision was reversed by the Lords Justices (1), and the proof admitted at its full amount. The bankrupt's separate estate consisted of his household furniture, which he valued at £4400, and his interest in the partnership, which he considered to be of no value. The furniture was disposed of, and realised £3850; no joint estate had been got in.

In March, 1871, Mrs. *Melbourn* made the above-mentioned application, supported by an affidavit, that the separate estate being insufficient to pay the separate creditors, the assignees and other joint creditors had no pecuniary interest in it; that their interests were antagonistic to those of the separate creditors; and that the assignees had made large payments out of the separate estate to the accountant of the bankrupt in respect of accounts connected with the firm, which could be of no possible advantage to the separate creditors. The deponent further stated that she had been informed by the bankrupt, and by the solicitors of the assignees, and believed that there were some joint assets which they expected shortly to realise; and it was shewn that nearly all the separate creditors were in favour of this application.

Mr. *Winslow*, and Mr. *Reed*, for the Appellant:—

This case is one where the separate creditors need protection, and the Court can grant it in this way: *Ex parte Miles* (2); *Ex parte Batson* (3); *Ex parte Dawson* (4); *Ex parte Wilson* (5). There is no reason for saying that this power has been taken away by the recent legislation: *Robson's* Bankruptcy (6); in fact, it is more necessary under the present statute than before.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the assignees:—

The cases referred to belong to a bygone state of the law, when separate creditors could not vote under a joint commission, and so had no voice in the appointment.

[The LORD JUSTICE JAMES:—This appears to be the case of a separate adjudication, under which the separate creditors had in reality no voice.]

(1) Law Rep. 6 Ch. 64.
(2) 2 Rose, 68.
(3) 1 Gl. & J. 269.
(4) 3 D. & Ch. 12.
(5) 1 M. D. & D. 310.
(6) Page 517.

To pay the costs in question out of the estate was right, for no joint estate has been realised, nor does it appear that any will; and in that case the joint and separate debts will be payable *pari passu*. The cases cited were before the Act of 1849, which constituted an entirely new tribunal, and if the power of appointing inspectors had been intended to be preserved it would have been mentioned.

[The LORD JUSTICE MELLISH:—Sect. 12 seems to give the Court all the old powers of the Court of Review.]

There is no instance of the exercise of any such jurisdiction under the existing law.

Mr. *Winslow*, in reply.

SIR W. M. JAMES, L.J.:—

I think it cannot justly be said that the jurisdiction of the Court is gone which was exercised in the cases to which we have been referred, where there was a conflict of interest between the majority, whose votes carried the appointment of assignees, and the minority, whose votes went for nothing. That jurisdiction should, I agree, only be exercised under special circumstances; but such circumstances exist here. The joint creditors have no concern in the question whether the separate estate is economically administered or wasted, and the separate creditors are almost unanimous in the desire that some one should be appointed to represent them at the expense of the separate estate. I think, therefore, that they ought to be allowed to appoint an inspector, but he must not be allowed a roving right to ravel into everything from the beginning. A meeting may be held for the appointment of an inspector, who will be at liberty to take such steps as may be necessary with the sanction of the Registrar.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Sole, Turner, & Turner*; Messrs. *Thomas & Hollams*.

L. JJ.
1871
July 27.

Ex parte BRETT. *In re* HOWE.

Bankruptcy—Proof—Creditor holding Security—Security, whether on Bankrupt's Property.

R. & Co. consigned goods to *H.* for sale, drew bills on him which they indorsed to *B.*, to whom they handed the bills of lading as a security, and wrote to *H.* asking him to accept the bills as against the goods. *H.* gave an acceptance: "Accepted, payable at the *I. Bank* on the delivery up of the bills of lading." At the time when the bills became payable the affairs of *H.* were in course of liquidation by arrangement:—

Held, that the conditional acceptance made the security of *B.* virtually a security on property of *H.*, and that *B.* could not prove against the estate of *H.* without deducting the value of the security.

THIS was an appeal by the trustee under a resolution for liquidation by arrangement, from an order of Mr. Registrar *Spring Rice*, refusing to expunge a proof by the *Chartered Mercantile Bank* for £3070, the full amount of certain bills of exchange.

The debtor *Howe*, a general merchant and commission agent in *London*, had made a few shipments to *Ragavooloo & Co.* at *Madras*, that they might sell and account to him for the proceeds, but had no other dealings with them until the 2nd of April, 1870, when he received a letter from them stating that they had consigned to him certain skins and indigo for sale, and had deposited the bills of lading with the *Chartered Mercantile Bank* at *Madras* to secure a loan on the consignment, and had also given them bills drawn on *Howe*, and they requested *Howe* to accept the bills as against the goods, and sell them and account to *Ragavooloo & Co.* for the proceeds.

The bills mentioned in this letter, amounting to £2220, were presented by the bank for acceptance on the same 2nd of April, and were accepted by *Howe* in the following form:—"Accepted, payable at the *Imperial Bank, Limited*, on the delivery up of the bills of lading and policy of insurance of certain skins," &c. They were payable on the 5th of October.

There was another bill for £850 drawn by another firm on *Howe*, the circumstances as to which were precisely similar.

Before the bills became payable, *Howe*, on the 8th of September, 1870, filed a Petition for liquidation by arrangement. The bank,

on the 30th of September, at a meeting of creditors, tendered a proof for £3070, the amount of the bills, and on the 14th of October, 1870, Mr. Registrar *Brougham* decided that it was to be admitted at its full amount. After this, Mr. *Brett* was appointed trustee, and applied to Mr. Registrar *Spring Rice* to expunge the proof as having been improperly admitted. The Registrar, sitting for the Chief Judge, on the 11th of March, 1871, refused the application, on the ground that the security which the bank had was not on the property of *Howe*, but on that of a third party, and that they were therefore entitled to prove without deducting it.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the Appellant:—

Howe accepted the bills payable on the delivery of the shipping documents. The trustee, therefore, says to the claimant, "Prove, but hand over the documents." They reply, "We will hand them over if you pay us in full." The trustee says, "I cannot," upon which they say, "Then we will keep the shipping documents, and yet prove in full," thus endeavouring to stand in the same footing as if *Howe* had given an unconditional acceptance. This is a security which must be deducted: *Smith* v. *Abbott* (1); *Rowe* v. *Young* (2); *Ex parte Turney* (3). The case is very similar to *Smith* v. *Vertue* (4). Suppose the estate paid 20*s.* in the pound, the bank are trustees of the goods for the bankrupt's estate. That shews that the security is really on the bankrupt's own property. The other side rely on *In re Fraser, Trenholm, & Co.* (5); but in that case there was an unconditional acceptance, and the goods did not belong to the acceptor, but to a firm of which he was a member. *Ex parte Waring* (6) applies in the Appellant's favour.

Mr. *Cotton*, Q.C., and Mr. *Bagley*, in support of the order:—

Rule 272 of the Bankruptcy Rules, 1870, shews what is to be done by a secured creditor, and sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869, defines what he is. The Registrar has decided that we are not secured creditors. It is settled that there is no obligation to allow for a security which is not on property solely belonging to the bankrupt. Here the bankrupt swears that

(1) Stra. 1152.
(2) 2 Brod. & B. 165.
(3) 3 M. D. & D. 576.
(4) 9 C. B. (N.S.) 214.
(5) Law Rep. 4 Ch. 49.
(6) 19 Ves. 345.

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he had no interest in the goods. How, then, are they made out to be his? Because if he paid he would have a lien on them, and so has every surety on a security given by the principal debtor; but it has never been suggested before that this makes the property the property of the surety for the purpose of this rule, or that this right of a surety makes him a secured creditor. *Ex parte Waring* (1) has no application where the goods are in the possession of the acceptor of the bills.

SIR W. M. JAMES, L.J.:—

I am of opinion that in this case the decision of the Registrar cannot be sustained. The question is, whether, in substance, apart from technicality, the creditors held a security upon property of the bankrupt at the time when they made their proof. I am of opinion, upon the contract contained in this conditional acceptance, that as between the *Chartered Mercantile Bank, Limited,* and the bankrupt, these goods were the property of the bankrupt just as if it had been a contract for sale. The bankrupt, in effect, says by it, "I will accept upon your giving me the goods." The goods or the documents were to be tendered to the bankrupt before he became liable at all under the bills of exchange. Then the tender is made, or that which is an equivalent is alleged to have been made; that is to say, the bank say, "We have got these goods, and we tender them to you on your paying the bills of exchange." That amounts, as it seems to me, to an acknowledgment that these goods were, upon payment, the goods of the bankrupt, and not the goods of anybody else—goods which, on the payment of the debt, would immediately be vested for all purposes in the debtor. That, to my mind, shews that they were property of the debtor on which the creditors had a security; and that being so, the case seems to come clearly within the rule in bankruptcy that a creditor must deduct the value of his security and only prove for the difference. Nor do I think there is any injustice done by applying that rule in this case.

SIR G. MELLISH, L.J.:—

There is no doubt that the creditors in this case had security on these bills of lading and policies of insurance, and the only

(1) 19 Ves. 345.

question is, whether they are to be considered as a security on property of the bankrupt within the rule. The drawers of the bills were, no doubt, the original owners of the goods, and they made a consignment of them to *Howe* for the purpose of getting them sold in this country, and drew bills on him. Now it is quite clear that *Howe*, as between himself and the drawers of the bills, was under no obligation to accept the bills; and, according to the ordinary course of mercantile business, he would refuse to make himself liable to accept them unless he got the security of the goods, and his accepting in this special form was simply a mode of giving himself a security on the goods without depriving the *Chartered Mercantile Bank* of their security in case the acceptances were not paid. If the bills of lading had been transferred to *Howe* at the time when he accepted the bills, no doubt the goods would have become part of his estate, though of course he could only hold them as security for the liability he incurred on behalf of the drawers, and if he then pledged his interest in them to the holders as security for the bills, this would be treated as a security on his own property; instead of that he makes a bargain that the bills of lading shall be handed over to him at or before the time when he pays the bills. It appears to me that this practically comes to the same thing, and makes the security of the bank a security on property of his. The case appears to me clearly distinguishable from the case of a surety, because a surety is not entitled to the securities which the principal creditor may hold until he pays the debt: he has no bargain that the securities shall be given up to him, and it is merely after he has paid in full that the rule of equity comes in and says that he is entitled to the securities; but until payment, the securities are in no sense securities on property of his. Here, it appears to me that *Howe*, before he accepted the bills, made a bargain which practically made the security of the bank a security on property of his. The proof, therefore, must be only for the amount of the bills, less the value of the goods.

Solicitors: Mr. *Joseph Langton;* Messrs. *Clarke, Son, & Rawlins.*

L. JJ.
1871
July 27, 28.

Ex parte RUMBOLL.
In re TAYLOR & RUMBOLL.

Bankruptcy—Jurisdiction—Composition Deed—Bankruptcy Act, 1861, *s.* 136—*Bankruptcy Act*, 1869, *s.* 72—*Injunction.*

The Court of Bankruptcy has jurisdiction, under the *Bankruptcy Act*, 1869, s. 72, to decide all questions necessary to make a complete distribution under a deed of composition registered under the *Bankruptcy Act*, 1861, even though the deed contains no assignment by the debtor of his estate.

Two partners, *A.* and *B.*, dissolved partnership on the terms that *A.* should make over all his interest in the partnership property to *B.*, and should be indemnified by him against all the debts. One of the partnership debts was due to a banking company, who held, as security, property of the partnership, and also separate property of *A.* *A.* agreed to make over all his interest in the securities in the hands of the bank to *B.*, to enable him to pay the debts of the partnership. *B.* afterwards executed a deed of composition with his creditors, which was registered under the *Bankruptcy Act*, 1861, by which it was agreed that the creditors holding securities should only be entitled to a composition on the balance due to them, after giving credit for the value of their securities.

A. filed a bill against the bank and *B.*, praying relief against the bank for neglect in realising their securities, and praying for a declaration that if the bank resorted to his separate property—which, he stated, was not intended to be made over to *B.*—he was entitled to have the loss sustained by him made good out of the fund raised under the deed of composition.

Two of the creditors, parties to the deed, applied to the Court of Bankruptcy for an order declaring the rights of all parties in the securities, and to restrain *A.* from taking any proceedings in law or equity with respect to them:—

Held (affirming the decision of the Chief Judge), that the Court had jurisdiction to decide all questions relating to the securities and the debt due to the bank; but the Court refused to stay the suit in Chancery, as it prayed relief against the bank and *B.*, which could not be obtained under the deed, and varied the Chief Judge's order to that extent.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 25th of January, 1868, *W. W. Taylor* and *H. Rumboll*, who had carried on business together in partnership as stuff merchants, executed a deed of dissolution of partnership, by which *Rumboll* assigned all his interest in the capital and stock-in-trade to *Taylor*; and for better and more effectually enabling him

to get in the effects, debts, and premises, appointed him his attorney; and *Taylor* covenanted to pay and satisfy all debts and claims due from, or to be made on, the partnership, and to keep *Rumboll* indemnified against the same, and against all expenses which he might incur by reason of any proceeding arising out of the partnership.

One of the partnership debts was a sum of £3132 12*s.* 8*d.* owing to *Lloyd's Banking Company*, for which they held as security certain property of *Rumboll's*, namely, the title deeds of some freehold houses, some wine warrants, and two policies of assurance for sums amounting together to £2499. They had also a lien on twenty £10 shares in the bank in the names of *Taylor & Rumboll*, and on sixty-five £10 shares standing in the name of *Rumboll* alone.

In order to enable *Taylor* to pay off the debt due to the banking company, *Rumboll* agreed to make over these securities to him. This agreement was contained in a letter from *Rumboll* to *Taylor*, dated the same day as the deed of dissolution, which was as follows:—

"Notwithstanding anything in the deed of arrangement entered into between us this day, I hereby undertake, on your paying, or in any way satisfying, a debt due from our late firm to *Lloyd's Banking Company*, to execute any conveyance or assignment, but at your expense, for vesting in you the securities held by the said banking company in respect of the debt due to them; or in case the said banking company realise the same securities, and leave any surplus resulting from such securities after satisfying their debt, I hereby undertake to relinquish all claim to the same in your favour, and I do this as part of the arrangement entered into between us."

Rumboll alleged that the sixty-five shares standing in his own name were not intended to be comprised in the property so made over to *Taylor*, but the weight of evidence was in favour of their being included in it.

Taylor was unable to carry out this arrangement, and on the 7th of February, 1868, executed a deed of composition with his creditors, whereby he agreed to pay a composition of 8*s.* in the

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pound in manner therein mentioned, which payment was guaranteed by several of the creditors, and amongst others by Messrs. *R. Wood* and *S. S. Wood*. The deed contained a proviso, that if any creditor had a security enforceable against *Taylor* or *Rumboll*, such creditor, unless he consented to abandon his security, should be entitled to receive the composition upon so much only of his secured debt as should remain after realisation of his security, or giving credit for the value thereof.

This deed was executed by *Taylor* in the name of *Rumboll*, under the power of attorney contained in the deed of dissolution, but the validity of the execution was disputed by *Rumboll*.

By sale of the houses and wine warrants the banking company reduced the debt due to them to £1918 9*s.* 3*d.* The shares were valued at £1051 17*s.* 6*d.*, and a sum of £1253 1*s.* 4*d.*, being the amount of a composition of 8*s.* in the pound upon the bank debt, had been reserved by the trustees to await the decision of the Court as to the right of *Taylor* or his sureties.

The policies of assurance were allowed to drop; and in July, 1869, *Rumboll* filed a bill in Chancery against *Taylor* and the banking company, praying that the banking company might be charged with the amount which they might have received if they had surrendered the policies, and not allowed them to drop; that the sum of £1253 1*s.* 4*d.* might be applied in satisfying the amount due to the company; or that if the company resorted for payment to the sixty-five shares which he claimed as his, then that the £1253 1*s.* 4*d.* might be applied in making good to him the loss sustained thereby.

On the 20th of August *W. W. Taylor* died, and *H. Taylor*, his executor, was made a Defendant to the suit.

In February, 1871, Messrs. *R. Wood* and *S. S. Wood*, the two sureties, applied to the Court of Chancery for an order declaring that the banking company were, at the date of the registration of the deed, creditors of *Taylor & Rumboll* for £3132 12*s.* 8*d.*; that, in respect of the said debt, they were equitable mortgagees of the property held by them as before mentioned, including the sixty-five shares; that, if necessary, an account might be taken of what was still due to the banking company; that the shares might be sold or valued; that the banking company might be declared

entitled to a dividend of 8s. in the pound on the balance due to them after giving credit for the property realised by them, and for the value of the shares; and that *Rumboll* might be restrained from taking or prosecuting any proceedings at law or in equity with respect to the said sixty-five shares.

The Plaintiff *Rumboll* took a preliminary objection to the application, on the ground of want of jurisdiction; but the Chief Judge held that he had jurisdiction to deal with the whole question, and he accordingly stayed all proceedings in the Chancery suit, and made an order, on the points raised by the application, substantially in favour of the applicants. From this order *Rumboll* appealed.

Mr. *Little*, Q.C., Mr. *Winslow*, and Mr. *Graham Hastings*, for the Appellant:—

The principal question is, whether the Court had jurisdiction to make the order. We contend that there was none, either under the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), or the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71). With respect to the Act of 1861, the 136th section gives power to the Court to decide questions between parties to the deed, or relating to the estate assigned by the deed. But *Rumboll* was not a party to the deed in this case, for the power of attorney given by him to *Taylor* did not authorize the execution of this deed; nor did the deed contain any assignment of the property. In previous cases under this section the application has been made by the creditors or the trustees: *In re Carter* (1). With respect to the Act of 1869, the 72nd section gives very wide powers to the Court for determining questions in bankruptcy, but that has never been held to apply to cases of composition deeds (2).

The relief prayed by the bill cannot be given so completely by

(1) Law Rep. 1 Ch. 170.

(2) The material clause of sect. 72 is as follows:—"Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of such Court, or which the Court may deem it expedient or necessary to decide, for the purpose of doing complete justice, or making a complete distribution of property, in any such case," &c.

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the Court of Bankruptcy as by the Court of Chancery, and some part of such relief is quite beyond the province of bankruptcy, particularly the claim against the bank for neglect in not keeping up the policies. Therefore, at all events, the Chief Judge was wrong in restraining *Rumboll* from proceeding in his suit: *Moye* v. *Sparrow* (1); *White* v. *Simmons* (2).

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the sureties:—

By the 136th section of the *Bankruptcy Act*, 1861, complete jurisdiction is given to the Court with respect to all questions arising between the parties to and interested in deeds of arrangement, whether they contain an assignment of the debtor's property or not. *Rumboll* was properly made a party to the deed of composition by virtue of the power of attorney which he gave to *Taylor*; at all events, he was interested under it: *In re Mark's Trust Deed* (3); *Ex parte England* (4). But there is no necessity to have recourse to the Act of 1861, for the 72nd section of the Act of 1869 has been held to apply to cases under the old Act: *Ex parte Anderson* (5). It is true that was a case of bankruptcy, but the words are wide enough to include all cases of composition deeds which are included in the law of bankruptcy. The other parties are willing to submit all the questions arising in the suit to the Court of Bankruptcy, and that Court has full power to decide them. The suit in Chancery is therefore quite unnecessary.

Mr. *Fry*, Q.C., and Mr. *Finlay Knight*, for the banking company.

Mr. *Winslow*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that, in substance, the order of the Chief Judge is right. After some hesitation of opinion with regard to the jurisdiction, I think that the jurisdiction given by the Act of 1869 to the Court, which is now made a complete Court of law and equity,

(1) 18 W. R. 400; 22 L. T. (N. S.) 157. WN (1870) 93.
(2) Law Rep. 6 Ch. 555.
(3) Law Rep. 1 Ch. 429.
(4) Ibid. 12 Eq. 207.
(5) Ibid. 5 Ch. 473.

to determine all questions for the distribution of assets in bankruptcy, does extend to anything that might be fairly called a case in bankruptcy. Looking at the Acts of Parliament relating to bankruptcy, I am of opinion that I should be going too far if I were to overrule the decision of the Chief Judge, in saying that a composition deed is a case in bankruptcy within the meaning of the clause. All convenience is in favour of this interpretation, and whatever doubt I may have had on the words of the section is not sufficient to make me overrule his decision, where I feel that his decision will be far more convenient to the administration of justice. I am therefore of opinion that the Chief Judge was right in holding that he had jurisdiction in this case, as he would have in any ordinary case in bankruptcy. If this had been an ordinary case in bankruptcy, I am of opinion that it would have been his duty to deal with all the questions that would have arisen with respect to what had been done under the composition deed. I think, therefore, that it was his duty to determine, first of all, the application about the £1253 1*s.* 4*d.*, the amount of the composition on the debt due to *Lloyd's Banking Company*, which was placed in the hands of two trustees for a special object, to await the realisation of their securities. It appears to me that there has been really no question about that. It was money belonging to that estate, which nobody outside that deed would have any lien in respect of. It was money not paid in discharge of the covenants of *Taylor*, or in any way on behalf of *Rumboll*. It was money placed in the hands of trustees to abide the ultimate settlement of the accounts between the other creditors and *Lloyd's Banking Company*. It is quite right to say that that money does belong to the estate, subject of course to what may be due to *Lloyd's Banking Company* after the realisation of their security. I think also it was the duty of the Chief Judge to determine what ought to have been done with respect to securities, whatever question there may be as between *Rumboll* and *Taylor*, in respect to *Taylor's* covenant to indemnify *Rumboll* against all claims whatsoever due from the partnership, involving he may say an obligation to his (*Rumboll's*) estate, which was pledged to the bank. Whatever may be the rights as between *Rumboll* and *Taylor*, it is manifest that as between the other creditors and the bank, the bank were bound to realise the securities which were vested in them,

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including the shares, and to realise those securities for the purpose of ascertaining for how much they would be ultimately creditors of the estate. Then, it appears to me that the Chief Judge was also right in directing all parties to concur in a sale of those shares, and the application of them in reduction of the claim due to *Lloyd's Banking Company*, so that they might stand as creditors, and prove only in respect of the ultimate balance.

Those are all the questions that have to be decided, except that it is stated that the Chief Judge stopped the suit of *Rumboll* v. *Taylor*. I am of opinion that it is not necessary to stay that suit, and in my view it is not right to stay it. In that suit *Rumboll* makes specific charges against the bank, which he may not be able to sustain, of neglect in respect of some securities, which have nothing at all to do with the estate. If he has got any claim with respect to them he will make that out. He says, "I have also a claim in respect of *Taylor's* estate, because it has not paid what it ought to have paid, and exonerated my estate, which has gone to pay the partnership debt." That does not arise in bankruptcy at all. That being so, it appears to me, whatever chance he may have of success in that suit, he ought to be allowed to indulge in that litigation. I think the order ought to be varied, so as not to restrain him from proceeding with that suit. In other respects it is right.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The question whether the Court had jurisdiction seems to depend on the proper construction of the 72nd section of the *Bankruptcy Act*, 1869. If it had turned on the *Bankruptcy Act*, 1861, *Rumboll* not having, as I think, been sufficiently proved to be a party to the composition deed, I should have doubted whether there was any jurisdiction to make an order as against him; but I feel no doubt there is jurisdiction to make an order, so far as is necessary, for the purpose of determining the questions under the composition deed under the 72nd section of the *Bankruptcy Act*, 1869. If this is a case of bankruptcy, it has been held in *Ex parte Anderson* (1), that that section applies to past bankruptcy. And inasmuch as the Act of 1861 treated deeds of arrangement and composition as

(1) Law Rep. 5 Ch. 473.

matters in bankruptcy, we are not stretching the language of the Act too far if we hold, which is certainly the most convenient interpretation, that it applies to past deeds of composition. That being so, the question really, on the merits, is, whether the shares must be sold or valued, and *Lloyd's Banking Company* ordered only to prove for the balance. It appears to be a very clear question, because by the plain terms of the composition deed all securities—all the securities which were the property of *Rumboll*, as well as the securities which were the property of *Taylor*—are to be realised, and every creditor is only to prove for the balance. Therefore it is clear that *Lloyd's Banking Company* are only entitled to prove for the balance. I do not see what possible claim *Rumboll* can have to the rest of the money, which has, in fact, been deposited in the hands of trustees, waiting till that question is determined. When that question is determined, the balance will go back to the persons entitled, either the sureties or *Taylor*. Then I also agree that the suit in Chancery ought not to be stopped, as there are questions raised in it which do not relate to this composition deed at all. Perhaps the claims which *Rumboll* alleges he has against the estate of *Taylor* are really claims which could not be proved under the composition deed, being claims which arose subsequently to the composition deed. Therefore I agree that the suit ought to be allowed to go on for the purpose of determining both the questions between *Rumboll* and *Lloyd's Banking Company*, and the question between *Rumboll* and *Taylor*.

Solicitors for the Appellant: Messrs. *Harper, Broad, & Battcock*.

Solicitors for the Respondents: Mr. *H. F. Wood*; Messrs. *Leman & Perkins*; Messrs. *Sharp & Ullithorne*.

L. JJ.
1871
July 30, 31.

NUNN *v.* HANCOCK.

Conditions of Sale—Vendor and Purchaser—Delusive Condition—Sale by Court of Infants' Reversionary Personal Estate—Jurisdiction.

A reversionary legacy, in which infants were interested, was sold by an order of the Court in an administration suit.

The particulars of sale stated that infants were interested in the property, and there was a special condition that the purchaser should make no objection on the ground of want of jurisdiction:—

Held (affirming the decision of *Malins*, V.C.), that the condition of sale was fair and reasonable, and that the purchaser was bound by it.

Semble, that the Court had jurisdiction to make the order for sale, and that the infants and all other parties were bound by it.

THIS was an appeal from an order of Vice-Chancellor *Malins*.

Thomas Hancock, by his will, dated the 1st of August, 1857, gave the residue of his real and personal estate to trustees, upon trust with all convenient speed to sell and convert into money all such part thereof as did not consist of money, money in the funds, or Government securities, and upon trust to stand possessed of the moneys arising from such sale, and all other his moneys, stocks, funds and securities, upon trust, after payment of his debts, &c., to be divided beween his nephews and nieces therein named, and the issue of those who should be dead at the time of his death, as tenants in common.

The testator made a codicil to his will, dated the 8th of December, 1863, and thereby gave a sum of £3000 to his trustees upon trust to invest the same, and to pay the income to his niece *Mary Ann Hancock* for life; and the testator declared that from and after her decease the said trust fund should sink into and form part of his residuary estate.

The testator died in 1865, and shortly afterwards a suit was instituted to administer his estate, and the sum of £3233 3*s.* 1*d.* £3 per Cent. Annuities, representing the legacy given to *Mary Ann Hancock* for life, was carried to the separate account of "*Mary Ann Hancock* and the residuary legatees."

The persons entitled to the legacy after the death of *Mary Ann Hancock* were twenty-one in number, of whom several were infants.

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By an order made in the cause on the 22nd of January, 1870, it was ordered that the reversionary interest in twenty of the twenty-one shares of the said sum of £3233 3*s.* 1*d.* expectant on the death of *Mary Ann Hancock* should be sold, and the money paid into Court to the credit of the cause. The other share was not ordered to be sold, in consequence of the objection of the person entitled thereto.

In the particulars of sale the property was described as "The absolute reversion to £3079 3*s.* 11*d.* Bank £3 per Cent. Annuities, being twenty of twenty-one equal parts of £3233 3*s.* 1*d.* like annuities standing in the name of the Accountant-General, on the credit of the cause *Nunn* v. *Hancock*, 'The account of *Mary Ann Hancock* and the residuary legatees,' receivable on the death of the said *Mary Ann Hancock*, who is now in the forty-fourth year of her age."

The 7th condition of sale contained the following stipulation: "The Judge having seen fit to order a sale of the reversion expectant on the life interest of *Mary Ann Hancock*, notwithstanding several infants were and are still interested in the reversion, the jurisdiction of the Court to make such order shall not be questioned, nor shall any objection or requisition be made on account of such order."

The reversion was bought by *J. L. Hart*, who afterwards moved to be relieved from his purchase, on the ground that the Court had no jurisdiction to order the sale. The Vice-Chancellor refused the motion, and the purchaser appealed from his decision.

Mr. *Fry*, Q.C., and Mr. *Byrne*, for the Appellant:—

The Court had no jurisdiction to make the order for sale, so far as the infants' shares were concerned. The Court sells the personal estate of an infant, because by so doing it is carrying into effect the intentions of the testator for winding up the estate; but it has no jurisdiction to sell either the real estate or the reversionary personal estate of an infant: *Calvert* v. *Godfrey* (1); *Blacklow* v. *Laws* (2); *Waters* v. *Waters* (3); *Bennett* v. *Wheeler* (4); *Dart's* Vendors and Purchasers (5); *Warren* v. *Richardson* (6); *Johnstone*

(1) 6 Beav. 97.
(2) 2 Hare, 40.
(3) 15 W. R. 191. W.N. (1866) 543.
(4) 1 Ir. Eq. 18.
(5) 4th Ed. p. 1084.
(6) You. 3.

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v. *Baber* (1). Although the Court may sometimes have dealt with an infant's reversionary property, it has only been done where a special case was made, nothing of which kind appears here. The order was simply made by consent of the adult parties, the counsel for the infants not opposing.

If the Court has no jurisdiction, the condition of sale will not bind the purchaser, for it is delusive and nugatory: *Dart's* Vendors and Purchasers (2); *Davidson's* Precedents (3); *Beioley* v. *Carter* (4); *Ward* v. *Trathen* (5).

Mr. *Cotton*, Q.C., and Mr. *Peck*, for the Plaintiffs; and

Mr. *Alexander*, for the Defendants beneficially interested, were not called on.

Mr. *Locock Webb*, for the trustees.

SIR W. M. JAMES, L.J.:—

It appears to me that the purchaser in this case ought not to be released from his purchase. The conditions of sale are perfectly plain, and not calculated to deceive any one. The purchaser is told that the property is a reversion; he is told that it is sold by order of the Court in a suit; and he is told that some of the parties interested are infants. And then follows this condition:—[His Lordship read the 7th condition of sale.] It was thought that probably some astute conveyancer would find some objection to the jurisdiction of the Court, and the stipulation is therefore inserted that the purchaser is not to raise any such objection. I can see nothing unreasonable in such a condition.

With respect to the objection itself, I have not been much impressed with it; for there is a great difference between a sale of reversionary personal estate and a sale of real estate belonging to an infant. I think this is just a case in which such a condition of sale may be fairly introduced. The purchaser having bought with his eyes open, and not having discovered any facts of which he was not informed by the conditions of sale, has not, I think, now any

(1) 8 Beav. 233.
(2) 4th Ed. p. 1109.
(3) Vol. i. p. 503.
(4) Law Rep. 4 Ch. 230.
(5) 14 Sim. 82.

right to question the jurisdiction. The Court, under all the circumstances, thought it better to sell the reversion, and all parties interested in the fund, except one, concurred in that opinion. The appeal will be dismissed with costs.

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SIR G. MELLISH, L.J. :—

I am of the same opinion.

Mr. *Fry* asked that, for the security of the purchaser, the order might be prefaced by a declaration that the Court was of opinion that all parties to the suit, and all parties served with notice of the decree, were bound by the order for sale.

The LORD JUSTICE JAMES said that there would be no objection to that declaration.

Solicitor for the Purchaser: Mr. *Byrne.*

Solicitor for the Parties to the Suit: Messrs. *Hume & Bird;* Mr. *J. H. Devonshire;* Mr. *W. Horsley, Jun.*

ATTORNEY-GENERAL *v.* CASTLEFORD LOCAL BOARD OF HEALTH.

L. JJ. 1871 *Aug.* 1.

Practice—Cons. Ord. IX., rr. 14, 15, 16—*Amendment of Information and Bill.*

An affidavit in support of a special application for leave to amend an information and bill, the amendments of which had been approved by the Attorney-General, was made by the solicitor alone, the Plaintiff not joining :—

Held (affirming the decision of *Bacon*, V.C.), that the rule that the Plaintiff must join in the case of a bill does not apply to an information and bill; and that the affidavit was sufficient.

THIS was an application to discharge an order of Vice-Chancellor *Bacon* giving leave to amend.

The suit was commenced by information and bill, the Earl of *Mexborough* being Relator and Plaintiff, to restrain the *Castleford Board of Health* from allowing sewage to pass into a certain stream, or into the river *Aire,* so as to pollute the stream or the river as

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they respectively passed through or along the land of the Plaintiff, so as to be an annoyance to or injurious to the health of the public.

The information and bill was filed on the 18th of June, 1870. The Defendants, the board of health and their clerk, put in their joint and several answer on the 17th of October, 1870, and it was not excepted to. On the 2nd of March, 1871, a summons, returnable on the 7th, was taken out for leave to amend the information and bill, not requiring any further answer. This was supported by an affidavit that the draft of the proposed amendments had been settled and signed by counsel, and approved by the Attorney-General, and that the amendment was not intended for the purpose of delay or vexation, but because it was considered material for the case of the Relator and Plaintiff; and that, for the reasons therein stated, the matter of the proposed amendment was material, and could not, with reasonable diligence, have been sooner introduced into the information and bill. This affidavit was made by the solicitor of the Plaintiff and Relator, the Earl himself not joining in it, and no reason being given why he did not. Vice-Chancellor *Bacon* held that an affidavit by the solicitor alone was sufficient, and gave leave to amend.

Mr. *Eddis*, Q.C., and Mr. *F. Webb*, for the appeal motion :—

Under Cons. Ord. IX., rules 14, 15, & 16, the Plaintiff ought to join in the affidavit. The object of this rule is shewn in *Christ's Hospital* v. *Grainger* (1). It is true that in an information the affidavit of the solicitor is sufficient: *Attorney-General* v. *Corporation of London* (2); *Attorney-General* v. *Wakeman* (3); but when an information and bill are joined, that is no reason for altering the rule as to the Plaintiff, for the information might succeed though the bill might not be sustainable: *Attorney-General* v. *East India Company* (4). The Plaintiff could be cross-examined on such an affidavit: *Catholic Publishing Company* v. *Whyman* (5).

Mr. *Kay*, Q.C., and Mr. *Vaughan Hawkins*, *contrà*, were not called upon.

(1) 1 Ph. 634.
(2) 13 Beav. 313.
(3) 15 Sim. 358.
(4) 11 Ibid. 380.
(5) 11 W. R. 399.

SIR W. M. JAMES, L.J.:—

This application is in the highest degree technical, and I think it ought not to prevail. The Vice-Chancellor was of opinion that the rule obliging the Plaintiff himself to join in the affidavit on a special application for leave to amend does not apply to an information, nor to an information and bill, but that the order to amend may be obtained upon an affidavit made by the Attorney-General's solicitor. It is only reasonable to suppose that the Attorney-General will not lend himself to anything introduced for the purpose of delay, or anything which can be in any way objectionable. Then, if the Attorney-General is entitled to have his information amended on the affidavit of his solicitor, this right cannot be affected, as it seems to me, by the fact that he has, for the convenience of the parties, chosen to join as Plaintiff somebody who suffers a private wrong connected with the public wrong of which the information complains. The Attorney-General has a right to have the information put in the proper form, and I do not think that he can lose that right because the Plaintiff does not choose to join in the affidavit. Moreover, the Plaintiff joining in it is the merest matter of form. No doubt it is true that, as has been suggested, he might be cross-examined upon the affidavit, but at this period of the cause no cross-examination could be had for any effective purpose; and I am glad that the Defendants will not have the opportunity of taking such a purely vexatious step as a cross-examination under such circumstances would be. In my opinion, the order of the Vice-Chancellor is right.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Swann & Co;* Messrs. *Duncan & Murton.*

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July 31; Aug. 1.

In re PROFESSIONAL, COMMERCIAL, AND INDUSTRIAL BENEFIT BUILDING SOCIETY.

Winding-up Petition—Benefit Building Society—Locus standi of Petitioners—Advanced Members—Release of Petitioners' Debt—Insolvency of Company.

A Petition was presented by four members of a permanent benefit building society, formed under 6 & 7 Will. 4, c. 32, whose shares had been advanced on mortgage, for winding up the society. One of the rules of the society gave the trustees powers to borrow any money that might be necessary for the purposes of the society, under which considerable sums of money had been borrowed on deposit, and some of the depositors pressed for their money, which the society were unable to pay without calling on their members. The committee of the society had accordingly proposed that the business should be transferred to another company and the society wound up, to which the great majority of the shareholders had agreed. After the Petition was presented, the creditors of the society executed a release to the Petitioners from their debts, and the committee offered to effect a transfer of their mortgages.

Held, on appeal (reversing the decision of *Wickens*, V.C.), that, as the release of the Petitioners operated as a release to the whole society, the Petitioners were under no direct or indirect liability in respect of the existing debts; that the society being one of unlimited liability, and the rule as to borrowing *ultrà vires*, the insolvency was not proved; and that the interest which the Petitioners had in the profits, as advanced members, was not sufficient to induce the Court to make a winding-up order contrary to the wishes of the great majority of the other members. The Petition was therefore dismissed, but without costs.

Though a creditor is entitled to a winding-up order against an insolvent company *ex debito justitiæ*, this is not so as to a contributory.

THIS was an appeal from an order of Vice-Chancellor *Wickens*, directing the *Professional, Commercial, and Industrial Benefit Building Society* to be wound up.

The society was established in June, 1855, under the 6 & 7 Will. 4, c. 32, as a permanent benefit building society, and its rules were duly certified.

The object of the society was stated in the rules to be as follows:—"To enable each member to receive out of the funds the amount or value of his share therein, each share not to exceed the sum of £120, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to the society until the amount or value of his shares shall

have been fully repaid, with the interest thereon, and all fines or other payments incurred in respect thereof."

The following were the principal rules referred to in the argument:—

Rule 8. "Every member having purchased, or having had assigned by ballot his share, shall pay, as redemption-money and interest, 3*s.*, or such other sum as shall be agreed upon with the committee, for every share at the seventh subscription meeting after such purchase or allotment, and shall continue paying the same at every succeeding periodical subscription meeting during his continuance in this society."

Rule 10. "Every member, before receiving any sum of money to which he may be entitled, shall mortgage the property offered, as security to the trustees for the time being of this society, subject to such powers, provisions, declarations, stipulations, and agreements as the solicitor of the society may require; and in such mortgage deed not only the amount to be advanced, but also the premiums and all other payments which may be due, shall be secured to the society."

Rule 23. "When a member who has received his share shall, by his contributions and portion of the profits, have realised £120 and paid the balance, the trustees under the advice of the solicitor shall deliver to such purchased member, or his legal representatives, the title-deeds and other documents which shall have been deposited with them, with a receipt indorsed pursuant to Act 6 & 7 Will. 4, c. 32, s. 5, and when a member who has not received his share shall in like manner have realised £120, the trustees shall, within three months from the time such share is completed, pay the same to him."

In the month of March, 1870, the following additional rule was passed:—

"The trustees for the time being may from time to time, as may be necessary for the purposes of the society, borrow and take up money at interest from any banker, or from any other person; to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received."

The present Petition was presented by *J. Smart*, *W. F. Hall*,

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T. Dalton, and *E. Edwards*, four of the advanced members. They stated that both before and after the passing of the last stated rule the society had received large sums of money on deposit at interest, and at the time of presenting the Petition there was more than £18,000 due to such depositors; and notices of withdrawal to the amount of £5000 had been given.

The society had overdrawn their account with the *Birmingham Banking Company*, who were the bankers of the society.

There were no available assets of the society except the contributions from advanced and investing members, which came in at stated periods in small sums, wholly insufficient to provide for the demands of the depositors. On the 25th of May, 1871, the committee of the society called a meeting of members for the purpose of considering the position of the society, and presented a report to the meeting recommending that the business should be transferred to the *Queen's Benefit Building Society*. The Petitioners also complained that there had been erroneous divisions of profits, and that serious questions had arisen between the various classes of members and between the members and the committee.

Under these circumstances the Petitioners submitted that the company was unable to pay its debts, that it was just and equitable that it should be wound up, and that it had in fact ceased to carry on business, and existed only for the purpose of winding up its affairs.

The Petitioners *J. Smart*, *W. F. Hall*, and *T. Dalton* had paid up their subscriptions on their shares, but *E. Edwards* was in arrear.

After the Petition had been presented, deeds of release were executed by the *Birmingham Banking Company*, and seventy-eight out of ninety-two depositors, representing a debt of £18,034 out of about £18,700, relieving the four Petitioners from all liability; and a deed of indemnity was also executed by five of the committee, indemnifying the Petitioners from all claims not covered by those releases. The committee also offered to effect a transfer of the mortgages of the three Petitioners who were not in arrear, or to allow them to pay them off on terms to be settled by arbitration. The Petitioners, however, were not satisfied with what was proposed, and insisted on the prayer of the Petition.

The Vice-Chancellor held that the three Petitioners were entitled to a winding-up order, on the ground that the company was unable to pay its debts, and made the order accordingly. The society appealed from this order.

Mr. *Karslake*, Q.C., for the Society, and Mr. *Ince*, for some of the members and depositors:—

This is not a Petition by creditors of the company, but by debtors, who, although they are members, have very little interest in the company. When they have paid off their mortgages they will cease to be members. The company being one of unlimited liability, it cannot be held to be insolvent until it has been shewn that all the members are unable to pay the debts of the company, which is not pretended here. When the Petition was filed the Petitioners were liable to be made contributories; but now all their liability, both direct and indirect, on account of the existing debts, has ceased; for the release which has been executed by the creditors operates not only to extinguish the debts as against the Petitioners, but also as against all the other members of the company, the release being an absolute one. The remaining members have entered into a fresh liability with the creditors, by which the Petitioners are not affected. The only *locus standi* which the Petitioners now have is, that until their mortgages are paid off they are entitled to a share in the profits, by which their mortgage debts would be reduced. But that is so small an interest that the Court will not regard it in opposition to the wishes of all the other shareholders: *Fleming* v. *Self* (1); *In re National Permanent Benefit Building Society* (2); *In re Doncaster Permanent Building Society* (3); *In re Suburban Hotel Company* (4); *Hill's Case* (5); *Ex parte Wise* (6); *Ex parte Wyld* (7). But, independently of the release, the debts of the depositors could not be recovered against the society, but only against the committee personally, because the rule enabling the society to borrow money was *ultrà vires*: *Davis' Case* (8); *Laing* v. *Reed* (9).

(1) 3 D. M. & G. 997.
(2) Law Rep. 5 Ch. 309.
(3) Ibid. 3 Eq. 158.
(4) Ibid. 2 Ch. 737.
(5) Law Rep. 9 Eq. 605.
(6) 1 Drew, 465.
(7) 1 Mac. & G. 1.
(8) Law Rep. 12 Eq. 516.
(9) Law Rep. 5 Ch. 4.

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Mr. *Dickinson*, Q.C., and Mr. *Higgins*, for the Petitioners:—

With respect to the *locus standi* of the Petitioners: at the time when the Petition was filed they were liable to the debts of the depositors; for even though the borrowing might have been *ultrà vires*, the money was employed for the purposes of the society, and the society would be liable. The effect of the release is very doubtful. If the company were now wound up, the Petitioners would certainly be put on the list of contributories: *Tanner* v. *Smith* (1); *Sparrow* v. *Farmer* (2). They are, moreover, entitled to participate in the benefits. If the company were now wound up, their mortgages would be redeemed on better terms than if they went on paying their subscriptions to an insolvent society.

As members, we ask for a winding-up on three grounds. First: the company is unable to pay its debts. The report of the committee is sufficient to shew this. It speaks of the pressing claims upon the society. Secondly: it is only existing for the purpose of winding up its affairs. The committee have already decided to transfer their business to the *Queen's Building Society*, and have passed a resolution that the company should be wound up voluntarily, although they cannot legally carry that into effect. Thirdly: it is just and equitable that it should be wound up. It can be no advantage to any party to carry on an insolvent society which has got into difficulties by borrowing large sums of money under an illegal rule, and has been dividing profits on an erroneous principle.

Mr. *Graham Hastings*, for an advanced member who supported the Petition.

Mr. *Karslake*, in reply as to the costs.

SIR W. M. JAMES, L.J.:—

With all respect for the Vice-Chancellor, I am of opinion that this was not a proper case in which to make an order for winding up. This is a Petition of contributories, and contributories who are all of them debtors to the society: they are all persons who have received advances from this building fund, in respect of

(1) 4 H. & N. 196. (2) 26 Beav. 511.

which they are mortgagors. One of them, *Edwards*, who is in fact the principal Petitioner, is not only a debtor, but he is in arrear for a sum which he ought to have paid; and it is impossible to avoid seeing that the real object of the Petition was to try and get the question settled between him and the body as to the terms upon which he was entitled to redeem his mortgage. I am of opinion that that is not a proper object to justify the winding up of a company. Then the Petitioners say: We have a strict right to an order. We are contributories, and we ask for the order on these grounds: first, that the society is unable to pay its debts; and secondly, that it is "just and equitable"—which is the general expression used at the end of the clause in the Act—under the circumstances of the case, that the company should be wound up.

Now, with regard to the debts, certainly the Petitioners have not given the statutory proof of the existence of debts which the company is unable to pay; because the statutory proof is that an action had been brought, that demand had been made in the nature of a summons in bankruptcy, and that the amount had not been paid. Nor has the insolvency been proved otherwise to the satisfaction of the Court. It has not been proved to my satisfaction that there is any debt whatever in respect of which the society could be liable. First of all, a society of this kind is not entitled to borrow money except under a particular rule; it is no part of its business to borrow money. It may incur debts, no doubt, to a certain extent; it must, for instance, incur office rent and employ a solicitor and a secretary; and to that extent, probably, there is always some small amount of debt which every body of this kind must incur. But beyond that it is very difficult to see what debts it could legally contract. But it appears that the society having gone on receiving deposits from persons other than members, and having incurred a debt to its bankers, passed a resolution authorizing the trustees to borrow money for the purposes of the society. I am of opinion that, in accordance with the decided cases, that resolution was expressed in terms far too wide to make it a valid or binding resolution, and therefore there never was any debt which the society *quâ* society could be sued upon. It is said that the trustees have borrowed this money for the purposes of the society, that they have given their personal liability, and that they may

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be entitled to come upon the assets. It may be that they would have a right to repay themselves out of the funds; that is to say, although they had no power to borrow the money, still, if they lent that money to other persons upon securities, I suppose they would be entitled to have the moneys borrowed, or the securities which have been given for the moneys, applied in exonerating themselves from the debts to which they have made themselves liable. That is the only mode in which it appears to me there could be any liability of the society or of its funds. That being so, it seems to me to dispose of the first part of the case.

Then I come to the question of its being "just and equitable" to wind up the company. Here are four persons taking a different view altogether from all the creditors—so far as they are creditors—and from all the other persons interested in the society, all of whom desire to have their affairs settled out of Court, without the expense and the ruinous consequences of a winding-up in this Court.

Then what is the wrong which the Petitioners suffer? They say that some fund has been, or may be, taken away from them, which would probably result in profits, and so diminish the amount of their nominal mortgage debt. If there had been no mistake in the mode in which profits have been calculated, they say that possibly they might have had something in diminution of the money which they have borrowed, and which they are liable to repay. If there has been any such error—for in this case there does not appear to be any suggestion of fraud on the part of the managing body—the proper mode of setting it right would be to apply to the managing body, or to call a meeting of the general body, and to take care that their proceedings were rectified for the future. That is the proper course; it is one which this Court has always sanctioned, considering it right that matters of internal management should be left to be settled by the persons interested.

But then it is also said, that if there is a winding-up order, the Petitioners may possibly get back for the society profits which have been paid out to retiring members upon that miscalculation of profits which they allege. I cannot see that it is the proper object of a winding-up to enable any existing members to get back from the past members something which, upon a miscalcula-

tion (which, apparently, all the members were parties to), those past or retiring partners have received. And, as far as the Petitioners are concerned, it appears to me by their own statement that it never can result in any profit whatever to them. They say that, possibly, those moneys would go in diminution of debts to which they are possibly liable. My opinion is, that they never were liable to the creditors for those debts at all. They never could be liable to the trustees to repay those debts, because the trustees could only be entitled to receive whatever funds were available for the purpose of recouping themselves; and their own case is, that there never were these profits; and if so, no return of anything would ever give the Petitioners profits which would go to reduce their debt. There may have been some degree of irregularity in the conduct of the society in the mode of dealing with the profits, but the release seems to me to have amply relieved the Petitioners from every possible liability whatever, so that they cannot have a shadow of interest in anything that could be gained from the result of this winding-up, in which possibly they might expose other people to losses which they would not share themselves. I am of opinion that the Petition ought to be refused, but without costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The Petition is presented by members who, no doubt, if the society were wound up, would be contributories, and they allege that the society is unable to pay its debts. Now, if a creditor cannot get paid—if he issues a proper summons and cannot get paid—then, no doubt, it is *ex debito justitiæ* to grant such a winding-up order. But when shareholders come for a winding-up order, it appears to me that it is the duty of the Court to see whether the other shareholders and the creditors agree in thinking that the winding-up is the best course. Now, here it is quite clear that if there are any creditors—which is extremely doubtful—the creditors, without an exception, and all the other shareholders, with the exception of the four who have presented this Petition, and one other, agree that the best course is not to wind up. Under those circumstances, the Court, in my opinion, ought not to grant a winding-up order unless it sees that some

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plain injustice is being done to the members who present the Petition which cannot be avoided otherwise than by giving them a winding-up order. Now these Petitioners are advanced members. There are, altogether, fifty-five advanced members, about fifty of whom, being in exactly the same position as the present Petitioners, do not desire a winding-up, but agree with all the other unadvanced members, and with all the creditors, that the society is more likely to get rid of its difficulties, and that the creditors, if there are any, are more likely to get paid, and the shareholders are more likely to get the proper share of their assets, by not having a winding-up. I cannot see that these Petitioners are liable to suffer any such injustice, or are liable to any such risk, as entitles them to a winding-up order. It seems to me almost admitted that the only loss, as between them and the other members, that they can suffer is, that they may possibly lose the benefit of having the profits applied towards paying the £120 per share due from them. Now, with reference to that, in the first place they themselves allege—and it is the chief ground of their Petition—that the profits are principally fictitious, and do not exist. At all events, there is nothing to shew that, if the accounts were rightly taken, there would be any profits coming to them, and the whole matter is left in uncertainty.

Then as respects their liability, I agree with the Lord Justice that, in all probability, they were never liable to anything; but even if they were liable, all the alleged creditors of the society have joined in a release, and I have no doubt that that release is an effectual protection.

Therefore, upon the whole, I am of opinion that we should be doing wrong in allowing the society to be wound up against the opinion of all the creditors, and of the great majority of the contributories who are interested in the society. I agree, also, that the Petition should be dismissed without costs.

Solicitors for the Petitioners: Messrs. *Lewis, Munns, & Longden.*
Solicitors for the Society: Messrs. *Doyle & Edwards.*

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In re FIDDEY (A SOLICITOR).

L. JJ.
1871
Aug. 2.

Solicitor's Lien—Charge under 23 & 24 *Vict. c.* 127, *s.* 28—*Practice—Jurisdiction.*

An order declaring a solicitor entitled to a charge under the 23 & 24 Vict. c. 127, s. 28, on the property recovered in a suit must be made in the branch of the Court to which the suit was attached.

The decision of *Malins*, V.C., reversed.

Semble, the fact that a suit has been absolutely dismissed is no objection to such an order being subsequently made in the suit.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

In the year 1867, *Thomas Jones* and his wife filed a bill against *William Frost* to set aside the sale of a reversionary interest in certain real estate which they had sold to him for £25. Their solicitor at the time of filing the bill was Mr. *H. Bull;* but in August, 1868, Mr. *C. Fiddey* was substituted for him. The suit was set down before the Master of the Rolls. The Defendant submitted to reconvey the reversion on being repaid his purchase-money, and receiving his costs of the suit; and the property was accordingly reconveyed, and the bill dismissed by consent.

In August, 1869, Mr. and Mrs. *Frost* sold their reversion at its full value to *S. G. Martin*, who again sold it to *J. L. Heinrich*; and *J. L. Heinrich* afterwards instituted the suit of *Heinrich* v. *Sutton*, before Vice-Chancellor *Malins*, against some other persons interested in the property. Mr. *Fiddey* had his bill of costs in *Jones* v. *Frost* taxed at £120, and he took out a summons in *Jones* v. *Frost* in the Chambers of the Master of the Rolls, asking for a charge upon the property recovered under the 28th section of the *Solicitors Act*, 1860 (23 & 24 Vict. c. 127). The Chief Clerk refused the application on the ground, as was stated, that the summons was not entitled "*In re Fiddey* (*a Solicitor*)," and that the suit of *Jones* v. *Frost* no longer existed; and the summons was never adjourned into Court.

Mr. *Fiddey* then took out the present summons, to the same effect, in the Chambers of Vice-Chancellor *Malins*, the summons

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HEINRICH v. SUTTON. — *In re* FIDDEY (A SOLICITOR).

being intituled, "In *Heinrich* v. *Sutton* and *In re Fiddey* (*a Solicitor*)," and the Chief Clerk made the order asked for. The Vice-Chancellor refused an application to discharge this order, being of opinion that the word "Court" in the 28th section of the Act (1) must be taken to mean the Court of Chancery and not any particular branch of that Court; and that an order of any branch of that Court was an order of "the Court" within the meaning of the Act. He therefore held, that Mr. *Fiddey* was at liberty to make the application in any branch of the Court; and that it was not necessary that the suit in which the property was recovered should be actually pending. He accordingly dismissed the application with costs; and from this decision the Plaintiff *Heinrich* appealed.

Mr. *De Gex*, Q.C., and Mr. *Ramadge*, for the Appellant:—

We contend, first, that this is *res judicata*. Mr. *Fiddey* first took out the summons in the Chambers of the Master of the Rolls, and when it was decided against him, instead of appealing, he has taken out a summons in another branch of the Court.

Secondly: the summons ought to be taken out in the branch of the Court in which the property was recovered. The word "Court" in the 28th section applies to a Court of Common Law, and "Judge" to a Judge of a Court of Equity.

Thirdly: the application can only be made in a suit which is still pending. The suit of *Jones* v. *Frost* is now extinct.

[He referred to *In re Keane* (2).]

(1) The 28th section is as follows:— "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or Judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property, as to such Court or Judge shall appear just and proper . . . ."

(2) 19 W. R. 429.

Mr. *Shapter*, Q.C., and Mr. *Story Maskelyne*, for Mr. *Fiddey*:—

The summons in the Chambers of the Master of the Rolls was informal because it was not intituled "*In re Fiddey.*" That was the main ground of its dismissal. It, therefore, does not preclude our repeating it in another Court with a proper title: *Flood* v. *Patterson* (1). There is no need to entitle the summons in any suit; if it is so intituled it is mere surplusage. The 23 & 24 Vict. c. 127, is to be read as one Act with the former *Solicitors Act*, 6 & 7 Vict. c. 73, and applications under the 37th section of that Act may be made in any branch of the Court: *In re Walton* (2); *Bingham* v. *Hallam* (3); *Robins* v. *Mills* (4); *In re Elmslie* (5); *Ex parte Sleeman* (6); *West* v. *Smith* (7); *Webb* v. *Grace* (8); *In re Barber* (9). The word "Court" throughout the Act is used not of a branch of the Court, but of the Court generally, as the Court of Chancery, the Court of Bankruptcy, &c. A suit which has been dismissed is still pending for some purposes; or else the costs could not be taxed in it: *Sellas* v. *Dawson* (10); *Boddy* v. *Kent* (11).

SIR W. M. JAMES, L.J.:—

I am of opinion that this order was improperly obtained from Vice-Chancellor *Malins*, inasmuch as it ought not to have been made in that branch of the Court. It ought to have been made, if at all, in the Court of the Master of the Rolls. The 28th section of the *Solicitors Act*, 1860, is as follows:—[His Lordship read the section.] It has been argued that the section may be read as if the word "Judge," were struck out, as if it had been simply, "the Court before which any such suit has been heard." But it is clear that the act of the Court is not merely ministerial—the solicitor is not to have any amount of charges which he may claim, but such order is to be made as to the Court or Judge shall seem just. It must, therefore, be a subject of judicial inquiry to

(1) 29 Beav. 295, 298.
(2) 4 K. & J. 78.
(3) 9 L. J. (Ch.) 104.
(4) 1 Beav. 227.
(5) 12 Ibid. 538.
(6) 12 W. R. 748.
(7) 3 Beav. 306.
(8) 12 Beav. 489.
(9) 14 M. & W. 720.
(10) 2 Anst. 458, n.
(11) 1 Mer. 361.

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what extent to charge the property, and this could only be done properly by the Judge who had heard the cause. This appears to me to throw light upon the use of the word "Judge" in this section. It was only in Chancery, as distinguished from a Court of Common Law, that causes could be said to be depending before a particular Judge; and it was reasonable that the particular Judge should be the person who should exercise a judicial discretion as to the amount of the charge for the benefit of the solicitor by whose efforts the property has been recovered. The Court of Chancery would have its jurisdiction as a Court of Appeal; but it is quite inconsistent with the object of the clause that one Judge should exercise such a discretion as to the amount of charge to be made in a cause which had been tried before another Judge. In the case of *In re Keane* (1) the Vice-Chancellor refused to make an order in the matter of a solicitor alone, because it ought to have been made in a cause, and, therefore, before the Judge who decided it—that is a judicial decision which has not been reversed. I am therefore of opinion that this application ought to have been made to the Master of the Rolls. It has been so made and has failed. It is no excuse that it was irregular as to its title. It is clear to me that that was not the real reason. It might have been amended, and adjourned till the next day. But the Chief Clerk appears to have come to the conclusion that the application could not be granted because the suit had been dismissed. If this decision was wrong, as I am inclined to think it was, it might have been taken before the Master of the Rolls, and, if necessary, to the Court of Appeal. But the application cannot be made to a different Judge to avoid the difficulty of *res judicata*. The application must, therefore, be refused, on the ground of want of jurisdiction.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Wilkinson & Howlett;* Mr. *Fiddey.*

(1) 19 W. R. 429.

BEGBIE *v.* FENWICK.
FENWICK *v.* BEGBIE.

L. JJ.
1871
July 21;
Aug. 3.

Taxation of Costs—Costs "so far as they have been increased."

B., a second mortgagee, filed his bill for redemption and foreclosure against *F.*, who held the first and third mortgages on the property. *F.*, by his answer, disputed *B.*'s security by denying the consideration, and filed a cross bill for foreclosure impeaching that security. By the decree made in both suits, *F.*'s bill was dismissed with costs, so far as it sought to set aside *B.*'s security, and *F.* was ordered to pay the costs of the first suit, "so far as the same have been increased by the answer of *F.* impeaching the validity of the security of *B.*" The Taxing Master held that the costs incurred by *B.* in proving the consideration, and consequent thereon, were the increase of costs in the first suit which *F.* was to pay, and that the expense of the hearing must be apportioned according to the number of folios, and that the costs of the second suit must be apportioned, as in *Heighington* v. *Grant* (1). He allowed the costs of three counsel in the second suit on account of the complexity of the case. *B.* objected to this taxation, and contended that he ought to be allowed all his costs except such as would have been incurred if the suits had been ordinary redemption and foreclosure suits heard as short causes, and that *F.* ought to have all his costs disallowed, except such as would in that case have been incurred, the difference being attributable to *F.*'s impeaching *B.*'s security:—

Held (affirming the decision of *Malins*, V.C.), that the Taxing Master had proceeded on a correct principle:

But *held*, that so much of *B.*'s bill as was directed to anticipating the objection taken by *F.*'s answer ought to be dealt with as occasioned by the objection taken in the answer, and that in the other suit regard ought to have been had in taxation to the circumstance that the complexity which justified the allowance of three counsel was owing to *B.*'s security being impeached.

THIS was a motion on behalf of *Begbie*, the Plaintiff in the first suit, by way of appeal from a decision of Vice-Chancellor *Malins*, refusing an application to review the Taxing Master's certificate in the two suits.

The first suit was a suit for redemption and foreclosure filed by *Begbie*, a second mortgagee, against *Fenwick*, a first mortgagee, who also had another charge subsequent to that of *Begbie*. The second suit was a cross suit by *Fenwick* for enforcing his security and impeaching *Begbie*'s security.

(1) 1 Beav. 223.

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By the decree made in both suits it was ordered that the bill in the second above-mentioned suit, so far as it sought to set aside or vary *Begbie's* securities, should stand dismissed with costs, and that the costs of *Begbie* in the first suit, "so far as the same have been increased by the answer of the Defendants *J. R. Fenwick*, *G. Hillyer*, and *E. J. Hambro*, impeaching the validity of the securities of the said *T. S. Begbie* in the pleadings mentioned," should be taxed, and should be paid by *Fenwick* to *Begbie*. It then directed an account of what was due to *Fenwick* and *Hillyer* and *Hambro*, his trustees, for principal and interest, "and for their costs of the second above-mentioned suit, except so far as it seeks to set aside or vary the securities of the said *T. S. Begbie* and of the first above-mentioned suit, except so far as the same have been occasioned by the answer of the said *Fenwick*, *Hillyer*, and *Hambro*, impeaching the validity of the securities of the said *T. S. Begbie*." The decree, in other respects, was in the ordinary form of a decree in two suits for redemption and foreclosure, one by a second mortgagee against a first and third mortgagee and the mortgagor, and the other by the first and third mortgagee against a second mortgagee and the mortgagor.

The principles on which the Taxing Master proceeded will be seen from the following written reasons which he gave:—

"*Begbie* v. *Fenwick*.

"It appears to me that the 10th and 29th paragraphs of the answer are the parts alluded to by the decree, whereby the Defendants impeached the security by denying the consideration.

"The costs, therefore, incurred by the Plaintiff in proving the consideration, and consequent thereon, are the costs directed to be taxed as being the increase caused by the impeachment of the security. I have read through the pleadings and evidence, and in the schedule hereto I have set forth the particulars thereof which appear to me to constitute such increase.

"The costs of such increase will be carried into the second column of the bill, which will shew the costs the Plaintiff is to receive under the decree.

"The expense of the hearing, that is to say, the fees to counsel and the attendances in Court, must be apportioned according to the number of folios.

"*Fenwick* v. *Begbie*.

"The taxation of the costs of this suit is directed on a different principle from the taxation directed in *Begbie* v. *Fenwick*.

"In *Begbie* v. *Fenwick* the Defendant is not directed to pay the costs of the suit, which are provided for in another part of the decree; but he is directed (in the part of the decree with which I am now dealing) to pay the increase of costs occasioned by his impeachment of the Plaintiff's securities.

"The suit of *Fenwick* v. *Begbie* was for two purposes, one to set aside or vary the securities, and the other to take the accounts.

"As to the first object, the bill is dismissed with costs, and *Fenwick* therefore pays the proportion of the general costs of the suit.

"And I have taxed the bill on this principle, and according to the cases of *Heighington* v. *Grant* (1) and *Hardy* v. *Hull* (2)."

The Taxing Master proceeded to state that both *Begbie* and *Fenwick* had left objections which he had overruled. *Fenwick's* objections were not argued, and need not be referred to.

The schedule to the Taxing Master's reasons contained a statement shewing the number of folios in the answer and evidence in *Begbie* v. *Fenwick* which related to the question of the consideration given for *Begbie's* mortgage.

The objections left by *Begbie* were as follows:—"The said *T. S. Begbie* objects to the principle adopted in the taxation, and contends that the true principle on which the said costs ought to be taxed is as follows: Allow to the said *T. S. Begbie* in the bills of costs Nos. I. and II. all the costs of the said suits respectively up to and including the hearing before the Vice-Chancellor, except such as would have been incurred if the suits had been common suits for redemption and foreclosure respectively heard as short causes, and disallow the said *John Richard Fenwick* all costs in the bills of costs Nos. III. and IV., except such as would have been incurred in such common suits heard as short causes respectively.

If the said *J. R. Fenwick* had not impeached Mr. *Begbie's* securities there would have been no contest whatever at the hearing. The

(1) 1 Beav. 228. (2) 17 Beav. 355.

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decree in the suits would have been of course but for the questions raised impeaching the securities of Mr. *Begbie*. The securities were impeached both on the ground of the circumstances under which they were entered into, and on the ground of the failure of consideration, and of the discharge of a Mr. *Stewart* as a surety. All the evidence as to the circumstances under which the securities were entered into, and also all the evidence as to the contracts, was addressed to this question, and was actually made use of at the hearing before the Vice-Chancellor for that purpose, and all the examinations in Court before the Vice-Chancellor, and the lengthened hearing before him, were addressed solely to this question. Under these circumstances the whole of the costs of the suits, down to and including the hearing, beyond the mere formal costs which would have been incurred in uncontested suits were occasioned by the attempt to impeach the securities of Mr. *Begbie*."

Begbie then applied to Vice-Chancellor *Malins* to have it referred back to the Master to review his taxation. The Vice-Chancellor refused the application, and *Begbie* appealed.

Mr. *Glasse*, Q.C., and Mr. *Marten*, for the appeal motion, contended that the taxation ought to be on the principle stated in *Begbie's* objections. They referred to *Attorney-General* v. *Lord Carrington* (1).

Mr. *Cotton*, Q.C., and Mr. *Waller*, contended that the Taxing Master was correct in applying the principle of *Heighington* v. *Grant* (2) and *Hardy* v. *Hull* (3).

Mr. *Glasse*, in reply.

THEIR LORDSHIPS said that they would communicate with the Taxing Master before giving judgment; and the case was accordingly mentioned again on a subsequent day, the Taxing Master being present.

Aug. 3. SIR W. M. JAMES, L.J., delivered the judgment of the

(1) 6 Beav. 454. (2) 1 Beav. 228.
(3) 17 Beav. 355.

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Court, and after stating the facts to the same effect as above, continued:—

We have had the opportunity of seeing the Master himself in the presence of counsel. He has pointed out to us that the two different forms of expression used in respect of the two bills respectively are well-known and established forms, leading to very different modes and results of taxation, such modes being also settled by the long and well-established practice of the Taxing Masters and their predecessors the old taxing officers of the Court.

We agree with the Master that the contention of *Begbie* cannot be sustained; that if the Court had thought that the costs of the litigation had been substantially caused by the unfounded contention of his opponent, it would have fixed the latter with the costs up to the hearing, or would have given the costs in some such language as that in which the objection to the taxation is couched.

The Master says (and we agree with him) that the Court not doing this, but giving costs on one principle as to one suit, and on another principle as to the other, has imposed on him the duty of applying those principles as he best may, according to the established practice, to the facts of the case. And we entirely concur in the memorandum of reasons with which he has furnished us. But we are not satisfied that he has, in the application of those principles, given Mr. *Begbie* all that he was entitled to. In the first suit we think he has put rather too narrow a construction on the words "so far as they have been increased by the answer." We think the true meaning of these words is, "so far as they have been increased by the contention in the answer." If *Begbie* had filed his bill in the few lines in which he might have set forth that he was the holder of a mortgage intermediate between two held by the Defendant, and praying that he might redeem the first and add it to his own security, and then be redeemed by the Defendant as owner of the third, and the Defendant had thereupon, by his answer, contested his title as mortgagee, and the Plaintiff had thereupon amended his bill to introduce charges and statements to rebut such contention, it would have been impossible to say that such amendment was not occasioned by the answer. We think that it ought to make no difference that he has in the bill antici-

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pated the contention, which had, in fact, been raised before suit; and that so much of the bill as was really and fairly directed to meet by anticipation the case made by the answer ought to be considered and dealt with as if it had been made by amendment after answer.

Again, in the second suit, we agree with the Master that it is very difficult, in most cases impossible, to deal with general costs where one party has the costs of part of a suit in any different way than by the rule of proportion which he has stated. It would be endless if the Master had to inquire how many hours of counsel's addresses were to be attributed to the one, and how many to the other part of the suit, or how much of a fee was to be attributed to the one and how much to the other.

But there was in this case a *datum*, which would have enabled the Master, with respect to the hearing for example, to have assigned a greater proportion of costs to that which was obviously the prominent subject of litigation. He has, by reason of the magnitude of the case, allowed three counsel instead of the ordinary two. Now, it is certain that the additional magnitude of the case which called for such allowance must have been due to the contention as to the validity of *Begbie's* security; and we think that, in the taxation, regard ought to have been had to that circumstance. We wish the Master, therefore, to reconsider his taxation accordingly. The order of the Vice-Chancellor must be discharged.

Solicitors: Messrs. *Thomas & Hollams;* Messrs. *Hillyer & Fenwick.*

Ex parte WIER. *In re* WIER.

L. JJ.
1871
July 27, 29; Aug. 3.

Debtor's Summons—Stay of Proceedings—Bankruptcy—Bankruptcy Act, 1869, ss. 6, 7—*Bankruptcy Rules*, 1870, *Rule* 41.

A creditor, on the 21st of July, 1870, served on a non-trader a debtor's summons for a sum exceeding £50. The debtor filed an affidavit denying the debt, and on the 5th of August obtained the common order that he should give security within seven days, and that on his so doing proceedings should be stayed till the Court in which proceedings should be taken for recovery of the debt had come to a decision. On the 12th of August an order was made by consent giving him a week's further time to complete the security. He never gave the security, and on the 16th of February, 1871, the creditor filed a petition for adjudication, on the ground of neglect to pay, secure, or compound for the debt:—

Held, that there was a complete act of bankruptcy at the expiration of three weeks from the service of the summons, and that the Petition, not having been filed till more than six months after that time, though within six months from the expiration of the extended time for giving security, was too late.

Semble, that if the debt is ultimately paid, the act of bankruptcy is one to which the title of trustees under an adjudication founded on a subsequent act of bankruptcy would not relate back.

THIS was an appeal from an order of Mr. Registrar *Pepys*, adjudicating the Appellant a bankrupt. The grounds of the appeal on the merits were, that there was no sufficient evidence of an act of bankruptcy, or of the petitioning creditor's debt, but a preliminary objection to the adjudication was raised which alone was argued before the Court of Appeal, that the act of bankruptcy (if any) occurred more than six months before the presentation of the petition for adjudication, and that therefore the order of adjudication was bad. The alleged act of bankruptcy was the neglect for three weeks after service of a debtor's summons to pay, secure, or compound for a debt exceeding £50, the debtor not being a trader.

The debtor's summons was served on the 21st day of July, 1870. Within the period of three weeks from the service of the summons the Appellant made an affidavit denying the debt, and applied to the Registrar to dismiss the summons, and obtained, on the 5th of August, 1870, an order from the Registrar that he should, within seven days, give the usual bond, with sureties, to pay such sum or

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sums as should be recovered by the creditor in any proceedings against him for recovery of the demand mentioned in the summons, and that on such security being given all proceedings on the summons should be stayed until the Court in which the proceedings should be taken should have come to a decision thereon.

On the 12th of August, 1870, being the last day for giving security, the Appellant, by consent of the petitioning creditor, obtained a further order postponing the time for perfecting the security till the 19th of August. The security never was given.

On the 16th of February, 1871, the petition for adjudication was filed, and on the 24th of March the Registrar adjudicated the Appellant a bankrupt.

Mr. *De Gex*, Q.C., Mr. *Bagley*, and Mr. *Cracknall*, for the Appellant:—

The petition is too late, the act of bankruptcy having been complete on the 12th of August, at the expiration of twenty-one days from the service of the summons. The terms of the *Bankruptcy Act*, 1869, sect. 6, are express, and the Registrar could not override them by enlarging the time. Any injustice from this is prevented by sect. 9, par. 2. Rule 41 of the Bankruptcy Rules, 1870, assumes that there may be an act of bankruptcy, though the proceedings have been stayed.

Mr. *Glasse*, Q.C., and Mr. *Reed*, in support of the order:—

Sect. 9 does not apply to a debtor's summons at all. *Ex parte Johnson* (1), shews the effect of staying proceedings. The result of the Appellant's argument is, that a rich solvent man who is served with a debtor's summons for £100, and defends the action, has committed an act of bankruptcy. According to Rule 24 of the Bankruptcy Rules, if the result of the action is in favour of the alleged debtor, the summons is to be dismissed, but in the meantime, according to the Appellant, he has committed an act of bankruptcy. The Registrar must, by the nature of the case, have a power to postpone. The form of summons, No. 4, in the Schedule to the Bankruptcy Rules, which have the force of an Act, supports our view. The scope of the Act, sect. 7, clause 2, is, that if the debtor is served

(1) Law Rep. 5 Ch. 741.

and does not take steps to dispute the debt, he is to be taken to have admitted it, and then his not paying it is an act of bankruptcy; he must be in default. The act of bankruptcy consists in "neglecting" to pay or secure the debt, and there is no neglect while the alleged debtor is taking steps to secure it as rapidly as the Court requires. The fallacy of the Appellant's argument is that it makes time run during a stay of proceedings, so that if an action was directed, as here, with a stay of proceedings, and the Plaintiff obtained a verdict after the six months, he would have no act of bankruptcy on which he could proceed. If he succeeds in the action in those circumstances, he cannot receive the debt, for he has notice of an act of bankruptcy.

[The LORD JUSTICE MELLISH:—But it is an act of bankruptcy on which no other creditor can proceed to adjudication.]

The 41st rule applies only where the alleged debtor has appeared to the summons, and some order is made with which he does not comply.

Mr. *Bagley*, in reply:—

A stay of proceedings does not affect the act of bankruptcy, but it prevents the creditor's proceeding on it while the proceedings are stayed. No harm can be done to a man by making him commit an act of bankruptcy of which no use can be made against him.

Aug. 3. SIR G. MELLISH, L.J., delivered the judgment of the Court, and, after stating the facts as above, continued:—

The question is, was the petition presented within six months of the completion of the act of bankruptcy. If the act of bankruptcy was complete on the expiration of three weeks from the service of the summons, the petition for adjudication was too late; but if the act of bankruptcy was not complete until the debtor made default in giving security in compliance with the order of the Registrar, the petition for adjudication was in time.

The 6th sub-section of the 6th section of the Act of 1869 describes the act of bankruptcy as follows: "That the creditor presenting the petition has served in the prescribed manner on the

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debtor a debtor's summons requiring the debtor to pay a sum due, of an amount not less than £50, and the debtor, being a trader, has, for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same." The effect of that section, unless qualified by some subsequent section, or by the rules, seems to us to be that if a person who is really indebted to another in a sum exceeding £50 is served with the summons, and does not pay or secure or compound for the debt within three weeks from the service of the summons, the act of bankruptcy is complete on the expiration of the three weeks. We think that if a person who is really indebted does not pay, he neglects to pay within the section. It is argued, however, that this section is modified by the 7th section, the latter part of which is as follows: "Any debtor served with a debtor's summons may apply to the Court, in the prescribed manner and within the prescribed time, to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him; and the Court may dismiss the summons with or without costs, if satisfied with the allegations made by the debtor, or it may upon such security (if any) being given as the Court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt." This section unquestionably enables the debtor, if in compliance with the rule he makes an affidavit denying the debt, to obtain the decision of the Registrar, and if the Registrar decides against him, and he gives security if required, the decision also of a competent Court, as to the existence of the debt; and although the section does not in terms say how or when the proceedings in bankruptcy are to be stopped, it is certainly absurd to suppose that the proceedings in bankruptcy are to go on until the question whether there is or is not a debt has been determined. Now this object may be attained either by holding that where an application is made to the Court within the twenty-one days to dismiss the summons, the completion of the act of bankruptcy is post-

poned until that application has been disposed of, or by holding that though an act of bankruptcy has been committed if there is a real debt to the prescribed amount, no petition for an adjudication can be presented, or by holding that though an act of bankruptcy has been committed, and though a petition for adjudication may be presented, yet that no order of adjudication can be made. We do not think that any other section of the Act throws any material light upon the proper construction of this section, and if the question had depended upon the Act alone we should have had great doubt what the proper construction was; but we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction. There are several rules relating to debtor's summons, but those rules do not appear to us to afford any material assistance in determining the question now before us. Reliance, however, was placed on the 41st rule, which is as follows: "A debtor shall not be adjudged bankrupt on a petition in which the act of bankruptcy stated to have been committed by him is, that the debtor has neglected to pay, secure, or compound with the petitioner a sum mentioned in a debtor's summons within seven days, or three weeks, as the case may be, where such debtor shall have applied for the dismissal of such summons, until after the hearing of the application, or where the summons has been dismissed, or during a stay of the proceedings thereon." Now this rule, in substance, lays down that if an application is made to the Court within the twenty-one days to dismiss the summons, the debtor shall not be adjudged a bankrupt until that question has been determined, and then only if it is determined against the debtor, and seems to us manifestly to assume that an act of bankruptcy may have been committed, and a valid petition of adjudication presented, before the Court of Bankruptcy has determined whether the debtor's summons ought or ought not to be dismissed; because if no act of bankruptcy could have been committed, or no valid petition for adjudication presented, it was wholly unnecessary to provide that the debtor should not be adjudicated a bankrupt. Reliance, on

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the other side, was placed on the form of the debtor's summons, and it was said that this form was so framed as to lead a debtor to believe that if he made an affidavit denying the debt, and applied to the Court to dismiss the summons, he would not commit an act of bankruptcy at the end of the twenty-one days. We think, however, that the form is quite consistent with the construction we have put on the 41st rule, and that it only holds out to the debtor that he will not be adjudicated a bankrupt, and does not hold out to him that he will not commit an act of bankruptcy if he really owes the debt and does not pay it within the twenty-one days. It was also argued that if an act of bankruptcy was committed in all cases at the end of the three weeks, the creditor afterwards could not safely receive payment of the debt, because he would receive it with notice that an act of bankruptcy had been committed, and that if the debtor was afterwards adjudicated a bankrupt on the petition of another creditor, the title of the trustee would relate back to the act of bankruptcy which was completed at the expiration of twenty-one days. We do not think this consequence would follow. When the debt is paid the act of bankruptcy committed at the expiration of the time mentioned in the debtor summons ceases to be an act of bankruptcy on which the debtor can be adjudicated a bankrupt, and we think it, at the same time, ceases to be an act of bankruptcy to which the title of the trustee can relate back under the 11th section.

12 CLD 28

On the whole we are of opinion that, in this case, the petition for an adjudication was presented too late, and that, consequently, the order of the Registrar must be reversed and the bankruptcy petition dismissed, and that the petitioning creditor must pay Mr. *Wier's* costs of opposing the petition in the Court below. If, however, Mr. *Wier* will undertake to bring no action on account of his having been adjudicated a bankrupt, we think he should also have his costs of this appeal, and that the costs, both in the Court below and of this appeal, should be taxed as between solicitor and client.

Solicitors: Mr. *A. Beddall*; Mr. *W. Foster*.

Ex parte ORDE. *In re* HORSLEY.

L. JJ.
1871
Aug. 3.

Liquidation by Arrangement—Adjournment—Resolution of Creditors—Majority —Bankruptcy Act, 1869, s. 16, *sub-s.* 7—*Bankruptcy Rules*, 1870, *Rules* 273, 275, 293.

At a meeting of creditors held under a petition for liquidation, an adjournment was proposed, and a resolution for adjournment was signed, but only by a number of creditors forming somewhat less than a majority in value of all the creditors who had handed in their proofs. The adjourned meeting was held, and resolutions for liquidation passed. The Registrar refused to register them, being of opinion that the adjournment was ineffectual, and the adjourned meeting therefore irregular. The Chief Judge ordered the resolutions to be registered, being of opinion that, under sect. 16 of the *Bankruptcy Act*, 1869, the majority required was not a majority of creditors present, but of creditors present and voting; and that, in the present case, the majority of those present had not voted either way:—

Held, on appeal, that a resolution for adjournment requires to be passed with the same formalities as other resolutions; and that every creditor who has handed in his proofs, and does not sign the resolution, must be taken to have voted against it, unless he withdraws his proofs under Rule 273; in which case, for the purposes of the proposed resolution, he is to be considered not present at the meeting;

Held, therefore, that the resolution for adjournment was not duly passed, and the adjourned meeting not duly held.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the County Court Judge of *Norfolk*, who had refused to direct the registration of certain resolutions of creditors.

On the 4th of November, 1870, Messrs. *Horsley & Son* filed, in the County Court of *Great Yarmouth*, a petition for liquidation, and notices were given for a meeting of creditors, on the 29th of November, at the *Inns of Court Hotel, Holborn*. Messrs. *Gurneys & Co.*, bankers, of *Great Yarmouth* (of which bank the Appellant, Mr. *Orde*, was the managing partner), were the largest creditors. At the meeting, Mr. *Orde* being in the chair, a long discussion took place, and no determination having been come to by the creditors, a solicitor present, who held the proxies of a number of creditors, proposed an adjournment. Mr. *Copeman*, the solicitor of the debtors, who also held a number of proxies, deposed that

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he openly stated at the meeting that he, on behalf of the creditors whom he represented, objected to the adjournment, and should vote against it. Mr. *Orde* also deposed that he voted against it. Several persons who were present deposed, on the other hand, that Mr. *Copeman* and Mr. *Orde* declined to vote. A resolution for adjourning the meeting to that day week was drawn up, and was signed by a number of creditors (being, as it was supposed at the time, a majority in value of those present personally or by proxy at the meeting), and was handed to the chairman along with the proofs and proxies of all the creditors who were present at the meeting personally or by proxy. The chairman directed Mr. *Copeman* to file them with the Registrar of the County Court at *Yarmouth*.

On the same day Mr. *Orde* filed, in the County Court at *Yarmouth*, a petition for adjudication in bankruptcy against *Horsley & Son*, on the footing of a declaration of insolvency signed by them on the 23rd of November, and left by them with Mr. *Orde's* solicitor; and on the 1st of December they were adjudicated bankrupts.

After this, Mr. *Copeman* handed in to the Registrar the proofs and proxies of the creditors attending the meeting of the 29th of November, and the resolution for adjournment. The Registrar declined to register the resolution. The adjourned meeting was held on the 6th of December, and resolutions for liquidation were passed which, it was admitted, were duly passed if the meeting was regular. The Registrar, on the 9th of December, 1870, refused in writing to register these resolutions, one reason alleged being that the adjourned meeting was not duly held.

The question whether this latter meeting was duly held turned upon the question whether the resolution for adjournment was effectual. On scrutiny, it turned out that the proofs and proxies handed in, as reduced by the scrutiny, amounted to £5913 12*s.* 9*d.*, and that the amount of the debts of the creditors, by whom or on whose behalf the resolution for adjournment was signed, was (as reduced on scrutiny) £2834 18*s.* 2*d.*, being less than half the total amount of proofs and proxies.

On the 22rd of March, 1871, the Judge of the County Court refused an application by the trustees appointed by the resolutions of

the 6th of December, 1870, to have the resolutions registered, the ground of the decision being that the resolutions were not duly passed. The trustees appealed to the Chief Judge, who, on the 9th of May, 1871, reversed the order of the County Court Judge, and ordered the Registrar to register the resolutions. His Honour was of opinion that, under the *Bankruptcy Act*, 1869, sect. 16, sub-sect. 7, the statutory majority required was not a majority of all the creditors present personally or by proxy, but of creditors present personally or by proxy and voting on the resolution, and that in the present case the majority of the creditors had not voted at all.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

At a meeting of this nature every creditor proves in person or by proxy, his proof being handed in to the Registrar. The signing the resolutions constitutes the voting for it: *In re Russell* (1); and in order that a resolution may be passed by a majority, we contend that it must be signed by a majority of all the creditors whose proofs are in the hands of the Registrar. What we say is, that a creditor votes for the resolution if he signs it; if he wishes not to vote, he must take back his proof under Rule 273 of the Bankruptcy Rules; if he neither takes away his proof nor signs, he is to be taken as voting against the resolution: Rules 273, 275, 276, 284, 293, 294 of the Bankruptcy Rules, 1870. Rule 293 is conclusive on the point. The forms in the schedule contain no column for non-assenting creditors. The resolutions describe the persons signing as a majority, which they were not. The Chief Judge went on sect. 16, sub-sect. 7 of the Act, relying on the words "voting on such resolution." We contend that this merely expresses that a majority can pass a resolution, and that to do so they must vote.

Mr. *Reed, contrà*:—

I contend that a mere resolution to adjourn does not require all the formalities prescribed by the rules for resolutions affecting the substance of the proceedings.

[The LORD JUSTICE MELLISH:—It seems to me that an adjourn-

(1) Law Rep. 5 Ch. 722.

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ment requires a formal resolution. Otherwise, on the face of the proceedings, the second meeting would appear irregular.]

Assuming that to be so, I contend that the Act and rules have been complied with. According to *In re Russell* (1), the Court can only look to the signatures to the resolution, and here the only signatures are those of assenting creditors.

[The LORD JUSTICE MELLISH:—Nothing is said in *In re Russell* about negative voting. The decision of the Chief Judge seems to me rather to go against the principle of that case, for he appears to have relied on the affidavit that *Copeman* said he should not vote.]

Rule 275 shews the intention of the Act and Orders.

[The LORD JUSTICE MELLISH referred to Rule 273.]

Rule 293 is not consistent with sect. 16, sub-sect. 7, of the Act, and is therefore *ultrà vires*.

[Rule 310 was also referred to.]

SIR W. M. JAMES, L.J.:—

This is an appeal from a decision of the Chief Judge in Bankruptcy, reversing the decision of the County Court Judge as to the filing and validity of certain resolutions passed under the liquidation clauses at an adjourned meeting. The question resolves itself into this, whether the resolution for adjourning the meeting was a valid resolution; for it is admitted that if there was no valid resolution adjourning the original meeting, then there was no valid meeting held afterwards, and the resolutions passed at it must of course be invalid. That question, if it had to be determined by the construction of the rules alone, would seem to me scarcely to admit of argument. The whole meaning and spirit of the regulations as to liquidation seem to me clearly to require that persons who wish to take things out of their normal course, and to deprive creditors of their legal right to have their insolvent debtor's estate administered in bankruptcy, should have the onus thrown upon them of obtaining the actual assent of a sufficient proportion of the other persons present at the meeting. There is nothing either in the rules or in the forms annexed to the rules which in any

(1) Law Rep. 5 Ch. 722.

way points to assents, dissents, and neuters, except in the one way to which I shall presently refer. The rules do not say that you are to shew that the persons who vote affirmatively are more than the persons who vote negatively. The language of the 293rd rule, which seems to me to be nearly conclusive on the matter, is that "where any resolution is required to be passed or any act to be done by the creditors present or represented at the meeting, the majority required for the purpose shall, in the absence of any enactment to the contrary, be a majority in value of the creditors present or represented thereat." That is to say, to make a resolution valid you must shew affirmatively, not that the assents are more numerous than the dissents, but that they amount to a proper proportion—either a simple majority or the statutory majority required—of the persons present at the meeting, and that is to be evidenced by a resolution signed by the persons assenting thereto. That being the resolution which is required to be produced to the Registrar for registration or for filing, the Registrar is to see that the persons assenting thereto do constitute a majority in value of the creditors present or represented at the meeting, or a majority of two-thirds, as the case may be; and the duty is not cast upon him of ascertaining whether any of the other persons present voted against the resolution, or expressed themselves neuter, or as not desiring to vote at all. It would give rise to endless conflicts if the Registrar had any duty of that kind to perform; whereas his real duty is simple—he has the papers before him, and he has merely to ascertain whether the resolution brought to him is signed by persons whose debts amount to the proper proportion of the total amount of debts proved. This explains the object of the 273rd rule, which enables a person who does not wish to vote at all upon any particular resolutions, nor to have his debt taken into account in ascertaining whether the requisite majority has been obtained, to withdraw his proof, so that he may no longer be considered present at the meeting. What was decided in the case of *In re Russell* (1) appears to me to be that you are to look only to the papers, and without attending to anything that was said or done in the room, to see whether those persons who have signed the resolution were the proper majority of those who had been present at the meeting, either by

(1) Law Rep. 5 Ch. 722.

L. JJ. 1871 *Ex parte* ORDE. *In re* HORSLEY.

themselves or by proxy. It was said, however, that this is inconsistent with the Act of Parliament, and that there is a provision of the Act about these liquidation meetings which throws us back to the provision of sect. 16, defining the majority as being "a majority of the persons present and voting thereon," that is, voting on the resolution; and it is said that Rule 293 is, therefore, inconsistent with the Act of Parliament. If there be such an inconsistency between the rules and the Act of Parliament, then beyond all question the case of *In re Russell* (1) was improperly decided, but it seems to me that there is no real inconsistency between the statute and the provision in the rules. The Act gives no definition or explanation of the words "voting thereon," and it is, in my judgment, quite within the scope of the authority given by the Act of making rules and regulations to define what shall be the meaning of the words "voting thereon." Taking the whole of the rules together, including the rule enabling a creditor to withdraw his proof, the scheme appears to come to this, that all persons who attend at the meeting and give in their proofs are to be considered as being there for the purposes of voting upon every resolution presented to the meeting. They are there for that purpose, and it is not necessary that they should express their dissent —if they are present, and do not express their dissent by signing the resolution, they are practically voting in the negative. If they do not wish to vote they must withdraw their papers from the chairman and retire, not retire personally, but retire from the resolution, and allow the matter to be decided by the others. It seems to me that this is the substance of the scheme, and it makes the Act of Parliament consistent with the rules.

I am of opinion, therefore, that the learned Judge of the County Court had come to a right conclusion on the matter, and that the Chief Judge in Bankruptcy was not right in reversing him. I cannot conceive that any difficulty can arise from this construction of the Act of Parliament and the rules. It is very important that every resolution, including a resolution for adjournment, should be carried by the statutory majority. At first I was inclined to think that a different rule might have applied to an adjournment, but on further consideration I think not, as an adjournment may be of vital importance to the interests of creditors. It may be a

(1) Law Rep. 5 Ch. 722.

very serious matter to some of the creditors to have the meeting adjourned again and again, and it is quite necessary that the rule should be exactly the same with regard to a resolution for adjournment as to any other resolution. If the majority of the creditors present desire that there should be an adjournment, they need only take the trouble of putting their names to a resolution for that purpose; and this is very much less inconvenient than having every question of this kind made the subject of cross affidavits as to statements by parties of their intention not to vote. I am of opinion, therefore, that a resolution for adjournment must, like any other resolution, be evidenced by a resolution in writing, signed by the proper statutory majority.

L. JJ. 1871 *Ex parte* ORDE. *In re* HORSLEY.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Peacock & Goddard;* Messrs. *Kent & Stenning.*

In re LEIGH'S ESTATE.

L. JJ. 1871 Aug. 4.

Compensation under Lands Clauses Act, 1845, *s.* 68—*Tenant for Life and Remainderman—Permanent Improvements and Repairs—New Buildings.*

On a Petition by a tenant for life, for the reinvestment of purchase-money paid into Court under the *Lands Clauses Act,* 1845, the Court will not allow any of the fund to be applied in recouping the tenant for life what he has already expended, unless such expenditure was properly a charge on the estate, nor in any proposed repairs to the mansion-house. But the Court has jurisdiction to order the reinvestment of the fund in building or rebuilding houses on the estate, and will do so if it appears beneficial to the estate, and if the remaindermen do not object.

The order of *Bacon,* V.C., varied.

When a Petition is presented by a tenant for life for the reinvestment of purchase-money in any other kind of investment than lands, the remaindermen ought to be served.

THIS was an appeal from an order of Vice-Chancellor *Bacon,* made on a Petition for reinvestment of money paid into Court under the *Lands Clauses Consolidation Act,* 1845.

Sir *R. H. Leigh,* by his will, dated the 10th of June, 1841, de-

L. JJ. 1871 *In re* Leigh's Estate.

vised certain freehold estates to the use of the late Lord *Kingsdown* for life, without impeachment of waste, with remainder to the use of the Petitioner (now Sir *R. H. Leigh*, Bart.) for life, without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with divers remainders over. And he bequeathed the residue of his personal estate to trustees, in trust to invest the same in the purchase of lands to be settled to the same uses as the devised estates.

The testator died in 1843, and Lord *Kingsdown*, the first tenant for life, died in 1867. In 1852 the local board of health for the borough of *Wigan* purchased a share in the *Wigan Waterworks*, being part of the residuary personal estate of the testator, and in 1865 the same board of health purchased part of the settled freehold estates; and the purchase-money in both cases was paid into Court under the *Lands Clauses Consolidation Act*.

In 1862, and at subsequent times, the *Lancashire and Yorkshire Railway Company* purchased portions of the settled freehold estates, and paid the purchase-moneys into Court under the same statute. At the time when the Petition was presented, the sums paid in by the local board of health amounted to £1142 3*s.* 1*d.* consols, and the money paid in by the *Lancashire and Yorkshire Railway Company* to £4057 5*s.* consols.

The Petitioner stated in the Petition that he had expended £1581 in making substantial and permanent improvements in the mansion-house called *Barham Court* and the grounds, which he particularly specified; and he alleged that "all the said improvements are calculated to increase the value of the said mansion-house and grounds, and to render the same more commodious to live in, and more eligible for letting, in case it should be necessary to let the same." The Petitioner had also expended £142 6*s.* 10*d.* in the erection of a new hop-kiln and buildings and of a new cooling-floor on a farm which formed part of the *Barham Court* estate, and the tenant was willing to pay an additional rent of £5 per cent. on that expenditure.

He further stated that the roof of the mansion-house required to be repaired at a cost of £100; that additional servants' rooms were wanted which would cost £357; that new farm buildings were required to an estimated amount of £444; that £350 were required

for increasing the outhouses and building a cottage on another part of the same estate; that £300 were required for additional cottages in another part of the same estate; and £58 18*s.* for rebuilding a storeage on another part of the property; and that a public-house called the "*Leigh Arms*" required to be rebuilt at an expense of £700: all which he alleged to be substantial and permanent improvements to the estate. The Petition, therefore, prayed that a sufficient portion of the funds in Court might be applied in repaying the Petitioner the two sums of £1581 and £142 6*s.* 10*d.* expended by him, and in doing the works proposed to an expense not exceeding the sums before specified, and that the board of health and railway company might pay the costs of the Petition. The only persons served with the Petition were the board of health and the railway company, and the Petition being unopposed, the Vice-Chancellor made the order as prayed.

Subsequently, however, the remaindermen, some of whom were infants, applied to the Vice-Chancellor to have the Petition reheard, on the ground that they had not been served, and had not had an opportunity of being heard.

The Vice-Chancellor granted the application, and the Petition was accordingly reheard. His Honour then decided that on a Petition by the tenant for life for the reinvestment of the purchase-money of settled lands in any other kind of investment than lands to be settled to the same uses, an order could not be made in the absence of the remaindermen; and as the remaindermen opposed the present application, he refused to allow any one of the items of expenditure recited in the Petition. His Honour accordingly dismissed the Petition, and directed the costs of the remaindermen to be paid by the Petitioner; the two companies to pay their own costs (1). The Petitioner appealed from the order.

(1) 1871. April 29.

SIR JAMES BACON, V.C.:—

In the course of the argument some blame has been attempted to be thrown upon the Court for having made this order. It has been said that this Court was bound to see that the remaindermen were served. But the order was made in the presence of two counsel—at least I suppose so. They were present, or ought to have been present, and no objection to the order was made. In addition to which, if I wanted any further excuse, I should find it in the authority of *Floyer* v. *Bankes* (Law Rep. 8 Eq. 115), where not only had an order for payment been made, but the money which was afterwards disallowed had actually been

L. JJ.

1871

In re LEIGH'S ESTATE.

Mr. *Freeling*, and Mr. *Lindley*, for the Appellant :—

With respect to some part of the expenditure on the mansion-house, namely, for building additional rooms and an addition to

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paid. But, in truth, there is no necessity to seek for any excuse for what was then done; because, according to the common practice of this Court, where an order has been made against any one erroneously, if, before the order is drawn up, the error should be discovered, it is perfectly competent to the Court to rectify its mistake, and have the matter reheard, so that a proper order may be made.

That service of a Petition of this kind upon the remaindermen is required by the practice of the Court, I entertain no doubt whatever. The provisions of the *Lands Clauses Act* are perfectly clear. The Act, by the 69th section, authorizes the reinvestment of railway money in the purchase of lands to be settled to the like uses; and there is a further provision that where buildings have been taken, there may be an employment of that money in reinstating the buildings. Beyond that there is nothing to vary the general scope of the statute; the whole extent of the provisions of which is to reinstate the estate and the buildings upon it. It follows, necessarily, that when an application is made to have the money employed — not in reinstating the property, but in making improvements on the estate—the remaindermen must be served.

In the last edition of *Seton* on Decrees (p. 1068) is given the form of an order for the repayment of sums expended by a tenant for life in permanent improvements. But that order was made expressly by consent of the tenant for life and the remainderman, who, it is stated, "was required to be served." That was in *In re Peat's Estates, Ex parte Stockton, &c. Railway Company*, before the Lord Chancellor, then Vice-Chancellor *Wood*, on the 25th of June, 1859.

I do not consider it necessary to refer to any authority for the proposition that the Court has the power, on the Petition of the tenant for life, without the presence of the remainderman, to lay out a railway company's money in the purchase of lands to be settled on the like trusts. But where the Court is asked to lay out such money in any other way, the presence of the remaindermen becomes necessary.

In this instance, that the remaindermen ought to have been served is plain. The correspondence of July, 1870, shews that, as a matter of ordinary good faith, that ought to have been done. It has been contended that the remaindermen had notice of the intention, on the part of the tenant for life, to present this Petition. But no regular notice was given, and the conduct of the Petitioner in this respect has certainly not been such as the Court can approve.

Then, as to the nature of the so-called permanent improvements. Can it be said that the laying out of money in the construction of gasworks, for instance, is a permanent improvement? If there were no authority for holding that such a work is not within the class of improvements which alone the Court will sanction, I should have felt no doubt; but there is abundance of authority. It is clear to me that constructions which from their first completion begin to wear out rapidly, one by one, cannot be permanent improvements; and when it is said that an

the conservatory, we are willing to withdraw the claim. But the remainder of the money spent on the mansion-house and grounds, and all the proposed repairs and buildings on the farms, cannot be denied to be permanent improvements, and they will increase the value of the estate. With respect to the expenditure which has been already incurred by the tenant for life, there is no reason why it should not stand on the same footing as what is proposed to be incurred; and the Court allowed money in Court to be so applied in *Re Wighte's Estate* (1) and in *Re Davis's Estate* (2). With respect to the proposed outlay, the Court has repeatedly allowed purchase-money to be expended in erecting new buildings and in reinstating old ones: *In re Incumbent of Whitfield* (3); *Ex parte Melward* (4); *In re Johnson's Settlement* (5); *In re Clitheroe's Trusts* (6); *In re Rudyerd's Trusts* (7); *In re Dummer's Will* (8);

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additional rent is procurable in consequence of some of this outlay, it must be remembered that of that increased rent the tenant for life has the benefit.

But even as to improvements which are permanent in their character, a series of authorities without interruption —except, perhaps, in the instance of *In re Dummer's Will* (2 D. J. & S. 515), which was a somewhat severe decision against the remaindermen— have held that to allow the *corpus* of an estate to be employed in the construction of, for example, a conservatory and hothouses, or even of farm cottages, would be to disturb all the rights which are established by the settlement. The question may be tried thus: Suppose the estate had remained untaken by the railway company, can it be for one moment contended that the tenant for life could have come and asked to be recouped for the cost of any of these improvements out of the proceeds of a sale of part of the inheritance?

The result is, that no one of those items can be allowed. The only point which presents any sort of difficulty is the question of costs. But holding, as I do, that the Petition is wholly misconceived, and that the person presenting it can obtain no relief upon it, the inevitable result is that the tenant for life, who has improperly presented the Petition, and obliged the present applicants to come hither to have it reheard, must pay their costs.

With respect to the two public companies it is different. It was their business, when brought hither, to have objected to the non-appearance of the remaindermen. Having permitted the former order to be taken in their absence, they are in default. I do not compel them to pay any costs; but they cannot be allowed their costs of the rehearing. The trustees will be at liberty to take their costs out of the estate.

(1) 6 W. R. 718.
(2) 3 De G. & J. 144.
(3) 1 J. & H. 610.
(4) 27 Beav. 571.
(5) Law Rep. 8 Eq. 348.
(6) 17 W. R. 345.
(7) 2 Giff. 394.
(8) 2 D. J. & S. 515.

L. JJ. 1871 *In re* LEIGH'S ESTATE.

In re Rector of Holywell (1); *Ex parte Shaw* (2). The Court has always exercised a wide discretion in cases of this description, and the opposition of the remaindermen is of no importance, as it was not necessary to serve them with the Petition.

Mr. *Eddis*, Q.C., and Mr. *Tremlett*, for the remaindermen:—

We object to the proposed application of the fund in repaying any of the expenditure already incurred; also to the proposed expenditure on the repairs and enlargement of the mansion, which the tenant for life ought to do at his own expense. We also object to the rebuilding of the public-house; but we do not object to the other items, namely, for building and rebuilding cottages and farm buildings, if the Court considers it has jurisdiction to order it.

Mr. *Wintle*, for the trustees.

Mr. *L. Field*, for the board of health.

Mr. *E. C. Willis*, for the railway company.

SIR W. M. JAMES, L.J.:—

We cannot sanction the fund being expended in repaying the Petitioner what he has already expended. That is never done, unless the expenditure was properly a charge upon the inheritance, for which there is no pretence here.

We think we have jurisdiction to allow the fund to be applied in building or rebuilding cottages and other edifices on the estate, for if the Court has power to order the money to be applied in buying a piece of land with a building upon it, there was no reason why a new building should not be built on the old land, if an increase of income is obtained thereby. It is a permanent augmentation of the property. But the Court will not do that if the remaindermen object; therefore the rebuilding of the public-house cannot be sanctioned. And we cannot sanction the proposed outlay on the repairs and alterations on the mansion-house, or on repairs generally on other parts of the estate. It is the duty of

(1) 2 Dr. & Sm. 463. (2) 4 Y. & C. Ex. 506.

the tenant for life to keep up the buildings, although he may be by law dispunishable for waste. The items allowed will, therefore, be the sums of £444, £350, £300, and £58 18*s*.

SIR G. MELLISH, L.J., concurred.

Mr. *Freeling* asked for the costs to be paid by the company and the board.

The LORD JUSTICE JAMES:—The company and the board must pay the same costs as if there had been only one hearing in the Court below, to be divided equally between them, on the principle of *Ex parte Bishop of London* (1). The costs of the appeal of the Petitioner, the remaindermen, and the trustees, to be paid out of the fund.

Solicitors for the Petitioner: Messrs. *Beachcroft & Thompson.*

Solicitors for the Remaindermen and Trustees: Messrs. *Meynell & Pemberton.*

Solicitors for the Railway Company: Messrs. *Clarke, Woodcock, & Ryland.*

Solicitors for the Board of Health: Messrs. *Sharpe, Parkers, & Co.*

(1) 2 D. F. & J. 14. 6 Jur. N.S. 640

L. JJ.
1871
Aug. 5.

19 Eq 442.

Ex parte LOPEZ. *In re* BRELAZ.

Bankruptcy—Absconding Debtor—Bankruptcy Rules, 1870, *Rule* 65.

A Petition for adjudication in bankruptcy against two partners, *A.* and *B.*, alleged, as the act of bankruptcy, that they had absented themselves with intent to defeat or delay their creditors. This Petition was directed, under Rule 65 of the Bankruptcy Rules, 1870, to be heard forthwith. *B.* had gone away only to take his wife and children to *Paris*, and returned immediately. He appeared when the Petition was heard, admitted insolvency, but opposed the adjudication, stating that he wished to present a Petition for liquidation, and he tendered evidence; but the Registrar, on learning that it only related to the circumstances of his going abroad, disregarded it as immaterial, and adjudged the partners bankrupts:—

Held, on appeal, that this order could not be sustained, for that the 65th rule of the Bankruptcy Rules, 1870, only applies where the debtor is keeping out of the way so that the ordinary course of proceedings cannot be taken; and that, if he appears, he is entitled to insist on the proceedings being conducted in the ordinary course.

THIS was an appeal motion to discharge an order of adjudication made by Mr. Registrar *Hazlitt*.

The Appellant, *Charles Brelaz*, carried on business as a commission agent and banker in *London*, in partnership with *Gustave Abt*. The Petition for adjudication was against both, and was filed on the 28th of July, 1871, by *Emiliano Lopez*, alleging, "that the act of bankruptcy committed by the said *C. Brelaz* and *G. Abt* is, that they, being traders, departed on or about the 21st day of July, 1871, from their dwelling-houses, or otherwise absented themselves, with intent to defeat or delay their creditors."

Down to Thursday the 27th of July, *Brelaz* had resided in his house, and daily attended at his place of business. On that day he took his wife and children over to *Paris*, left them there, and came back to *London* on Saturday the 29th. On Sunday, his housekeeper delivered to him a copy of the Petition which had been left for him at his residence, an order having been made, under Rule 65 of the Bankruptcy Rules, 1870, that the Petition should be heard forthwith. *Brelaz*, as early as possible on Monday morning, applied to his solicitor, who went at once to

the Court in *Basinghall Street,* and found that the Petition was being heard. He protested against its being heard *ex parte,* and the Registrar adjourned it till 1 o'clock on the following day. The hearing was resumed at that time. The Petitioner *Lopez* was then examined, and his solicitor, Mr. *Brandon.* From their evidence it appeared that *Brelaz* and *Abt* had some days previously admitted themselves to be insolvent, and that *Brelaz* had, on the 21st of July, signed a declaration of insolvency, and that *Brelaz* had made an appointment to meet the Petitioner on Thursday the 27th, to arrange about the debt due to *Lopez,* but did not keep it; and it appeared that on the 29th of July he had allowed his goods to be sold under an execution for a debt exceeding £50. Counsel appeared for *Brelaz,* and did not dispute the debt or the fact of insolvency, but opposed the adjudication, stating that *Brelaz* was desirous to present a Petition for liquidation. He tendered four affidavits, the reception of which was opposed on the ground that no copies of them had been delivered to the Petitioner, and no notice given of the intention to use them. The Registrar inquired what their object was, and upon learning that they went only to the circumstances about the journey to *Paris,* said that, if received, they would not carry the case of *Brelaz* any higher. *Brelaz's* solicitor then offered to produce him for examination, and asked to have the case adjourned; but the Registrar declined to do so, and adjudged both partners bankrupts. By leave of the Lords Justices, this appeal motion by *Brelaz* was set down to be heard before them, though the order of adjudication had not yet been drawn up.

It was stated that *Abt* had absconded about the 21st of July.

Mr. *Reed,* for the appeal motion:—

Under the old law an adjudication was made *ex parte.* The principle of the present law is, that if it is sought to make a person bankrupt he shall have full opportunity to defend himself. The 65th rule of the Bankruptcy Rules, 1870, requires to be applied with caution. It is intended only to be acted upon when a debtor is keeping out of the way. If he is not keeping out of the way, but comes asking to be heard, the rule has no application, and he must be proceeded against in the ordinary course.

L. JJ.
1871
Ex parte LOPEZ. *In re* PRELAZ.

Mr. *Swanston*, Q.C., and Mr. *Bagley*, *contrà*:—

It was avowed before the Registrar that the object of resisting adjudication was only to enable the debtor to take proceedings for arrangement by liquidation. The insolvency is admitted; no wrong therefore is done. *Abt* had absconded on the 21st; we therefore could not allege a later date. An act of bankruptcy had been committed—that is not denied—and the Registrar was not bound to adjourn the proceedings, the 38th rule only enabling him to do so where he thinks it reasonable.

[The LORD JUSTICE JAMES:—In my opinion, the Registrar has not properly acted under the 65th rule, and I think that, at all events, the case must go back to him, that the debtor and his witnesses may be heard. The Appellant's counsel will state whether he asks for anything more.]

Mr. *Reed*:—The matter is of great importance as a question of general principle, and I ask, *ex debito justitiæ*, to have the adjudication annulled, on the ground that a person who actually appears cannot be proceeded against under the 65th rule.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar has not put a right construction on the 65th rule. I agree with Mr. *Reed* that this rule was intended only to apply to a person who is actually absent, and cannot be proceeded against by the regular process; and that it does not apply to a person who appears in Court and desires to resist the adjudication. I am of opinion that the Registrar was bound to give the Appellant the same opportunities as any one else has of disputing an adjudication against him, and was quite wrong in asking what was the substance of his affidavits, and in refusing to hear them as immaterial, and in looking to the fact that the debtor had committed other acts of bankruptcy. The bankrupt appeared to a Petition which alleged him to have absented himself on the 21st of July, which he clearly had not done, and I think it no sufficient excuse for this misstatement that there were two debtors, and that one of them had gone away on the 21st. Creditors ought to be more particular than this as to the accuracy of their statements. Then, in opposition to the Petition, the debtor says: "It is true

that I went away from my place of business, but I did so only to escort my wife and family to *Paris*, and I returned immediately. I did not go away to avoid my creditors." The answer given to this is: "You have committed another act of bankruptcy, and you have broken an appointment with the petitioning creditor." He has a right to have an opportunity of disputing these facts. The 65th rule is only to be resorted to where the ordinary process is inapplicable. The Petition, however, cannot be dismissed, for there is some evidence of the debtor's having broken an appointment with the creditor, and the case must go back to the Registrar to be dealt with in the ordinary course.

SIR G. MELLISH, L.J.:—

I am of the same opinion. By the 34th rule the Registrar is to fix the time and place of hearing; and by the 36th rule the debtor is to state in writing the grounds on which he disputes the right to adjudication, and a copy of them is to be transmitted to the petitioning creditor. That is the ordinary course. Then the 65th rule provides that in the case of a debtor who is keeping out of the way, the Petition "may be," not "shall be," heard forthwith. The principle on which this proceeds is, that where a debtor is keeping out of the way and cannot be found, it is reasonable that he should be adjudicated bankrupt at once. In the present case, it being clear that the debtor had not absconded, the Registrar ought not to have proceeded under the 65th rule, but should have taken the ordinary course.

Solicitors: Messrs. *Lumley & Lumley*; Messrs. *G. S. & H. Brandon.*

L. JJ.
1871
Aug 4, 5.

ASTLEY *v.* EARL OF ESSEX.

Trustee—Discretion—Rights of Cestui que trust.

A testator devised his real estate to trustees in trust to pay an annuity of £6000 a year to his daughter, and subject thereto upon trust to accumulate the rents for twenty-one years, and out of the accumulated fund from time to time to pay his debts, legacies, and the incumbrances on the estates, and invest the residue in the purchase of lands to be held on the same trusts; and he directed the estates, on the expiration of the trust for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity of £6000 should be increased to £8000. He gave his residuary personal estate to his trustees upon trust to pay off the incumbrances, and apply the surplus in the same way as the accumulated rents and profits. He died leaving personalty which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, and incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; and they did not for several years pay off all the incumbrances:—

Held (reversing the decision of the Master of the Rolls), that the trustees were right in paying the annuity at the rate of £8000 a year from the testator's death, and must be allowed it in their accounts.

THIS was an appeal from a decision of the Master of the Rolls.

Thomas George Corbett, by will dated the 27th of July, 1861, after directing that his debts, funeral and testamentary expenses and legacies, should be paid out of his personal estate not specifically bequeathed, if sufficient for that purpose, and if not sufficient, then out of his real estate, devised his real estate to the use of trustees in fee, upon trust to pay to his daughter, the wife of Colonel *Astley*, out of the rents, an annuity of £6000 for her life, for her separate use, and after her death to her husband for his life, or until bankruptcy, &c., and subject thereto to pay several other life annuities, and subject thereto upon trust, for the period of twenty-one years from the testator's death, to accumulate the surplus rents by way of compound interest, and from time to time to pay off, out of the accumulated fund, the charges and incumbrances for the time being existing on his said estates, and his debts and legacies. And the testator declared, that the accumulations should be primarily and exclusively charged with the incumbrances, charges, debts, and legacies, so as not to postpone the payment thereof by any other means, but so as that the *corpus* of his estate, real and personal,

which might have been resorted to for such payment might be restored out of such accumulations. He further directed that, if the net rents and profits of his real estates and the accumulations should be insufficient, with his residuary personal estate and the accumulations of its income, to pay his debts and the charges and incumbrances on his estates, the accumulation should be carried on beyond the twenty-one years. He also directed that, upon the death of the survivor of his daughter and her husband, and the attaining of twenty-one by his daughter's eldest son, who would become entitled in possession to the estates, the accumulation should cease; and he directed that, upon the determination of the trusts for accumulation, the surplus of the accumulated fund should be held on the same trusts as moneys arising under the power of sale and exchange to be contained in the settlement which he directed to be made. He further empowered his trustees, during the twenty-one years, to apply any part of the accumulated fund in the purchase of estates, to be held on the same trusts as the devised estates. He then declared, that when and as soon as all charges and incumbrances on his estates should have been paid off, the annuity of £6000 thereinbefore directed to be paid to his daughter and her husband successively should be increased to £8000. He then directed his trustees, upon the expiration or determination of the trusts for accumulation, to settle the estates in manner therein mentioned, being a strict settlement under which the sons of his daughter were the first takers. The testator bequeathed his residuary personal estate to his trustees, to be applied by them in satisfying and discharging the incumbrances affecting his real estates in such course, order, and manner as should seem to them most expedient; and if there should then be any surplus, he directed it to be invested and accumulated in the same manner as he had directed as to the rents and profits of his real estate; and the accumulations were to be held on the same trusts as the accumulations of the rents.

The testator died in July, 1868. After his death, the eldest son of Mrs. *Astley*, still an infant, filed his bill against the trustees for the administration of the trusts; and the question to which this appeal related arose in the taking the account.

At the testator's death, his personal estate not specifically bequeathed amounted to £77,000 and upwards. The capital of the

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incumbrances on his estates (including some contingent charges), and his debts and legacies, did not altogether amount to quite £70,000. The life annuities charged by his will on the estates, exclusive of that to Mrs. *Astley* and her husband, amounted to £1160; and the net income of the property, real and personal, after payment of interest and of the life annuities other than Mrs. *Astley's*, was upwards of £13,000.

The trustees ascertained, in two or three weeks from the death of the testator, that his personal estate was amply sufficient for payment of the incumbrances, debts, and legacies. They did not, however, proceed at once to pay them all off; but as some of the personal estate was producing a high rate of interest, they retained a considerable part of it in hand; and also, with the sanction of the Court, made some purchases of real estate out of the rents and the personal estate. At the time when the present question arose, the unpaid incumbrances on the estates were a mortgage for £20,000, and contingent incumbrances, which might never become payable, for sums amounting to £14,000. The personalty in hand was about £30,000.

The trustees had paid Mrs. *Astley's* annuity at the increased rate of £8000 from the testator's death. The Chief Clerk of the Master of the Rolls refused, in taking the accounts, to allow more than £6000; and the matter being adjourned into Court, His Lordship held that, as the incumbrances had not actually been paid off, only £6000 a year should be allowed. The trustees appealed.

Mr. *Jessel*, Q.C., and Mr. *Cookson*, for the Appellants, contended that the rights of Mrs. *Astley* could not be affected by the fact that the trustees had not actually paid the incumbrances when they had a fund of personalty sufficient for the purpose. They referred to *Small* v. *Wing* (1) and *Bernard* v. *Mountague* (2).

Mr. *Cadman Jones*, for the infant Plaintiff, said that, as in the circumstances of the family it was for the benefit of the infant that his mother should have the increased annuity, he should not argue the point.

The LORD JUSTICE JAMES said that he would confer with the Lord Justice *Mellish*, and mention the case again.

(1) 3 Bro. P. C. 503; 5 Bro. P. C. (Toml.) 66. (2) 1 Mer. 422.

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Aug. 5. SIR W. M. JAMES, L.J., after stating the nature of the appeal and the dispositions of the will, continued:—

Apparently the testator died possessed of more personal estate than he contemplated, for it was not only sufficient to pay off all the debts, incumbrances, and legacies, but to leave a surplus of some thousands of pounds. The trustees thought it best not to pay them off at once, but to retain part of the personalty which was bearing a high rate of interest. The Master of the Rolls was of opinion that Mrs. *Astley's* annuity should have been increased only after the charges and incumbrances had actually been paid off; and he seems to have thought that the provision as to increasing it from £6000 to £8000 was intended as an inducement to make her see to the payment off of the charges; but I am of opinion that this cannot be considered to have been the intention of the testator. She had nothing to do with the administration of the trusts, and had no means of accelerating the payment of the charges. Upon principle, even independently of the two cases which have been cited, I should have been of opinion (and the Lord Justice concurs), that the interest of the *cestui que trust* is not to be affected by this sort of exercise of discretion on the part of the trustee, but that what might have been done must be considered as having been done. The incumbrances were, for all practical purposes, paid off when the money was in the trustees' hands, ready to be produced to pay off the charges, and was in the meantime producing income enough to pay the interest upon them. I think, therefore, that the increased annuity was payable from the testator's death. The only doubt I have felt was, whether the testator did not mean that the annuity was not to be increased until the charges had been paid off, and the personal estate replaced which had been employed in paying them; but I do not, upon consideration, think that this is what he intended. I am of opinion, therefore, that the trustees must be allowed in the accounts payments at the rate of £8000 a year in respect of this annuity.

Solicitors: Messrs. *Frere, Cholmeley, & Co.*; Messrs. *R. M. & F. Lowe.*

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March 24;
April 15, 17;
May 22;
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In re ACCIDENTAL DEATH INSURANCE COMPANY.

CHAPPELL'S CASE.

Amalgamation of Companies—Resuscitation of Company—Transfer of Shares—Power of Directors to reject Transferee.

The *A. Company* entered into an agreement with the *M. Corporation* that all its business should be transferred to the corporation, and that its shareholders should be entitled to shares in the corporation in exchange for their shares in the company. But the company was not formally dissolved or wound up. Afterwards the corporation, not being successful, was wound up voluntarily. A few days before the commencement of the winding-up, the former directors of the *A. Company*, in the name of the company, entered into an agreement with the corporation for a retransfer of the principal part of the business of the company, and notice was given to the shareholders that the company had resumed business. A board meeting of the former directors was held in the same month, in which they sanctioned a transfer by *C.*, the solicitor of the company, of 2145 shares for a nominal consideration. By the articles of the company the directors had no power to reject a transfer unless they found a substituted transferee. The company was afterwards wound up, and *C.*'s name was settled by the Master of the Rolls on the list of contributories in respect of those shares:—

Held, on appeal, by *James*, L.J., that, although the transfer was out and out, and therefore would have been valid if the company had been a going concern, yet, the transfer of the business to the corporation having been completed, the shares were no longer capable of being dealt with, and that the transfer was invalid:

But *held*, by *Mellish*, L.J., that the company not having been formally dissolved or wound up, the shares might still be dealt with, and that the transfer was good.

The decision of the Master of the Rolls affirmed.

The deed of settlement of a company provided that where a shareholder wished to transfer his shares he should leave notice at the office of the company, and that the directors should consider the proposal, and signify their acceptance or rejection of the proposed transferee: and that if they should reject the proposed transferee, and should not, within fourteen days, procure some other person to take the shares at the market price, the proposed transferee should be considered as approved by the directors, and should be entitled to take the transfer accordingly:—

Held, by *Mellish*, L.J., that the directors had not an absolute power to reject a proposed transferee; but could only do so if they could provide a substitute for him.

THIS was an appeal from an order of the Master of the Rolls placing the name of Mr. *F. J. Chappell* on the list of contributories

of the *Accidental Death Insurance Company* in respect of 2145 shares.

The company was formed by a deed of settlement dated the 1st of June, 1854, under the name of the "*Travellers' and Marine Insurance Company.*"

The deed provided (by Clause 20) that when any shareholder wished to transfer his shares, he should propose the person to whom he wished to transfer as a shareholder, by leaving at the company's office a notice in writing to that effect under his hand; and (by Clause 21) that when such proposal should have been made, the directors should forthwith take the same into consideration, and should certify to the person making the proposal their acceptance or refusal thereof, and the person so proposed should, if accepted, be thenceforth considered as approved by the directors; and if the proposed person should be rejected, and the directors should not within fourteen days procure some other person or persons to take the share or shares proposed to be transferred at the market price for the time, in such case the person or persons so proposed should be considered as approved by them, and be entitled to take such transfer accordingly.

The deed also contained clauses providing for the dissolution of the company.

On the 18th of April, 1859, an Act of Parliament was passed by which the name of the company was changed to the "*Accidental Death Insurance Company,*" which was the name of a company whose business they had purchased.

On the 1st of July, 1865, an agreement was entered into under which the company was amalgamated with, and its business transferred to, the *Accidental and Marine Insurance Corporation, Limited,* and the shareholders in the company were to be entitled to shares in the corporation in exchange for their shares in the company. The company had no power under their deed of settlement or the Act to effect this amalgamation, but all the shareholders had consented to the arrangement. The corporation was registered under the *Companies Act,* 1862, on the 5th of August, 1865. On the 12th of October, 1866, a Petition was presented for winding up the corporation, but before any order was made the shareholders

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resolved to wind up the corporation voluntarily, and a supervision order was made on the 3rd of November, 1866.

On the 9th of October, 1866, just before the Petition for winding up the corporation was presented, a deed for resuscitating the *Accidental Death Insurance Company* was executed by the former directors of the company in the name of the company, and by the corporation, by which it was declared that the agreement of the 1st of July, 1865, should cease to operate, and that the *Accidental Death Insurance Company* should resume the business as to insurance for accidental deaths, and should indemnify the corporation in respect of all past and prospective risks on account of such insurances.

On the 10th of October a circular was issued to the shareholders of the company, announcing the resumption of business by the company.

On the 23rd of October a meeting of the former directors of the company was held, at which the following transfers of shares in the company were passed: 1084 shares belonging to *G. Tyler*, a director; 2145 shares belonging to *F. J. Chappell*, the solicitor of the company; 1068 shares belonging to *A. Smee*, a director; 928 shares belonging to *J. G. B. Lowell*, a director. All these shares were transferred to a person named *Montgomery* for a nominal consideration.

On the 28th of March, 1867, *W. G. Lankester* and other shareholders presented a Petition to wind up the company. The Petition was withdrawn in consequence of an arrangement called the "*Southampton* Compromise," under which the Petitioners and the other dissentient shareholders were allowed to transfer their shares to *H. Proctor*, a nominee of the directors, who received £10 for accepting them, the shareholders at the same time paying 10*s.* on each share. By a deed, dated the 31st of May, 1867, six of the directors covenanted to indemnify the dissentient shareholders against all liability in respect of these shares.

This arrangement came into question in *Lankester's Case*, before the Master of the Rolls, when his Lordship held the transaction invalid, and directed *Lankester* to be placed on the list of contributories in respect of his shares. The case was brought, by way

of appeal, before Lord Justice *James*, who affirmed the decision of the Master of the Rolls (1).

(1) 1870. July 7. L. J. JAMES.

In re ACCIDENTAL DEATH INSURANCE COMPANY.
LANKESTER'S CASE.

MOTION by way of appeal from the order of the Master of the Rolls, to remove the names of *W. G. Lankester* and six other persons from the list of contributories of the above-mentioned company.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the Appellants.

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings*, for the liquidator.

SIR W. M. JAMES, L.J., after stating shortly the facts of the case, continued:—

What does this come to? Here is a company which merges into another company. It transfers its business, and virtually ceases as a company to exist. The shareholders agree to give up their original shares in the old company, and accept new shares of the new corporation. But this transfer of the business of the company to the corporation could not destroy the liability of the shareholders of the company at the suit of creditors of that company, and therefore the directors went beyond their powers in making that transfer. No directors could transfer the liability of shareholders, as these directors have sought to do. No doubt, so far as directors, or shareholders, or both, could bring a company virtually to an end as a company, that company was brought to an end and its business handed over to a new company. The old company was truly merged in the new corporation. But the corporation was not itself successful; and, therefore, some of the shareholders took legal advice, and found, of course, that they were still liable to the creditors of the old company: they accordingly took upon themselves to make an arrangement, by which they proposed to separate themselves again from the corporation. They took upon themselves to act as directors without having any right to do so, and said, "We will make arrangements for resuming our old business, but we will only resume that part which was profitable to us." Then, some shareholders did not agree with this resumption of business, and sought to get rid altogether of their responsibilities by making an arrangement with the persons who thus set themselves up as the representatives of the company. The allegations contained in the Petition presented for winding up the company have never been met. It contained serious charges against certain persons whose conduct was attacked; but of course it was possible to put a stop to the Petition by arrangement, and therefore an agreement was made between the persons whose conduct was attacked and the Petitioners, that the Petition should be dropped on certain terms, namely, that the Petitioners should pay a sum of 10*s.* a share, and that on payment of that sum their shares should be transferred to a nominee of the directors.

Well, what did these gentlemen themselves strive to do? They knew perfectly well what they were doing, as the fact of their taking an indemnity plainly shews. It was a transfer by the directors, and there can be no doubt it was *ultrà vires* so far as they were concerned. Even if they were properly qualified as directors, they were writing off the liability of a certain number of shareholders at the expense of the other shareholders, and were

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Under these circumstances the Master of the Rolls settled *F. J. Chappell's* name on the list of contributories in respect of the 2145 shares which he had transferred to *Montgomery*, considering that the case was governed by *Lankester's Case;* and from this decision *Chappell* appealed.

Montgomery was examined in Court *vivâ voce*, before the Lords Justices, on the question whether the transfer to him was a transfer out and out.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the Appellant, contended that the present case was distinguishable from *Lankester's Case*, where there was a corrupt bargain with the directors to relieve the shareholders from liability. In the present case the evidence conclusively shewed that the transfer was out and out, and there was no reason why it should not be sanctioned by the directors. The directors had no power to refuse to sanction a transfer unless they could find a substitute for the transferee.

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings*, for the liquidators, argued that the attempted resuscitation of the company was *ultrà vires*, and was a mere scheme to enable the principal shareholders to escape from their liability. The transfer in this case was open to the same objections as that in *Lankester's Case*. The directors were guilty of a breach of trust in consenting to the transfer to *Montgomery;* and *Chappell*, who was their solicitor, was cognisant of, and a party to, that breach of trust.

Mr. *Jessel*, in reply.

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doing so to get rid of a damaging Petition which was presented against them. That was a proceeding the directors had no right to take. The shareholders who executed this deed must also have known that, as between themselves and the creditors of the company, such a transfer could not be a *bonâ fide* transaction, and hence, of course, their anxiety to have whatever ultimate risk they might run covered by the guarantee which they took from the directors, or persons acting as directors, with whom this arrangement was made. That appears to me too clear to require further consideration; and I am of opinion that the Master of the Rolls was quite right in his judgment, and that this appeal must be dismissed.

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Aug. 5. SIR W. M. JAMES, L.J. :—

This is an appeal from an order of the Master of the Rolls, refusing an application of the Appellant, Mr. *Chappell,* to have his name taken off the list of contributories of a company called the "*Accidental Death Insurance Company.*" The Master of the Rolls was of opinion that this case was, in fact, governed by a previous decision given by himself at the Rolls in *Lankester's Case,* and afterwards affirmed by me, sitting alone as Lord Justice. I am of opinion that it is so governed. The *ratio decidendi* of that case was, that I was of opinion that there could be no transfer of the shares, because there were no shares to transfer. All the shareholders had agreed to an arrangement by which all the property of the concern, capital, assets of every kind, and the business were transferred to a new corporation, and all the shareholders accepted, in exchange for their shares, shares in the new company. I was of opinion that the result of that was, that there was a virtual dissolution of the company; that is to say, that the thing itself had ceased to exist as a thing in which there could be shares; that the shares themselves, having been given to the new corporation in exchange for shares in that corporation, became, so far as they had any existence whatever, the property of the new corporation; and that there was nothing left, except that which must always happen when partners, whether members of a company or of an ordinary firm, discontinue their business, that is to say, their contingent liability to answer such debts and engagements as the new corporation would not discharge, according to their agreement to that effect. That being so, if matters had stopped there, there was no such thing as was capable of transfer—there were no shares existing capable of being transferred. Then there was a series of subsequent transactions, with the apparent object of resuscitating the company when the new corporation got into difficulties. I was of opinion, and am still of opinion, that everything done afterwards was a mere sham and contrivance on the part of the directors, with whom Mr. *Chappell* was an active partner, being their solicitor, and, in fact, consulted and advising in all those matters. There was no company in effect, there was no board of directors, and there was nothing to which the machinery of the deed of settlement could apply.

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That being so, I held that the directors were not relieved from their liability; and upon the same principle, I am of opinion that Mr. *Chappell* cannot be relieved by what purports to be a transfer of that which, in my opinion, he had not to transfer.

The provisions in the deed of settlement respecting the transfer of shares are peculiar. [His Lordship then referred to the 20th and 21st clauses in the deed of settlement, and continued:—]

Now I am of opinion that, by the arrangement which all the shareholders were parties to, there was no proper office or place of business to which any such notice could be given. There were no directors who could take into consideration the proposal, and no company who could take the shares at the market price, and it is utterly impossible there could be a market price of shares, all of which were transferred to the corporation.

That being so, if the thing had been free from decision, I should have been of opinion that Mr. *Chappell's* name could not be removed; and I am unable to see any way in which his case can be distinguished from that of the directors, all of whose dealings he was acquainted with and had been consulted upon.

SIR G. MELLISH, L.J.:—

16 Eq 454

As the Lord Justice is of opinion that the order of the Master of the Rolls ought to be affirmed, that order will of course stand; but I think it right to say that, in my opinion, the right of Mr. *Chappell* and the other shareholders of the company to transfer their shares in accordance with the terms of the 20th and 21st clauses of the deed of settlement was not affected by the directors of the company, with the consent, as is alleged, of all the shareholders, having transferred the business of the company to the *Accidental and Marine Insurance Corporation*, and of the company having ceased to carry on its business. I agree that the directors of the company were not entitled, at least without the consent of all the shareholders, to resume the business of the company; but I do not see how, until the company was actually dissolved under the provisions of the deed of settlement, or until a Petition was presented for a winding-up order, the right of a shareholder to transfer his shares could be affected.

I think the directors could not legally cease to exist, and though

they ought not to have resumed their business, I think the reason of that is not that it was beyond their power to do so, but because it would have been a fraud on the other shareholders of the company, whom they had induced to take shares in the corporation, that they should have begun business again so as to make those shareholders in fact, contrary to what they intended, owners of shares in both companies as going concerns. But if the shareholders who wished to revive the company had purchased the whole of the shares of the other shareholders, I think the business of the company might legally have been resumed; and I do not see why a particular shareholder who wished to get rid of his shares should be deprived of his ordinary right of selling them, and be compelled, if he wished to avoid the risk consequent on the resumption of business, to file a bill or apply for a winding-up order.

It is also said that the directors of the company, or the persons who were acting as directors, were guilty of a breach of trust in assenting to the assignment of such a large number of shares to Mr. *Montgomery*, and that Mr. *Chappell* was a party to that breach of trust. If by the terms of the deed of settlement of the company the directors had had power absolutely to refuse to admit a transfer to a person of insufficient means, I should have thought there would have been strong grounds for contending that the transfer of shares from Mr. *Chappell* to Mr. *Montgomery* ought to be held void on this ground. I am of opinion, however, that the 21st clause of the deed of settlement does not give power to the directors absolutely to reject any person to whom a shareholder proposes to transfer his shares. They are only to see if they can provide a substitute who will take the shares. Now there is no evidence nor any reason to suppose that the directors could have procured a more eligible person than Mr. *Montgomery* to take Mr. *Chappell's* shares, and I think the transfer ought not to be held to be bad because the directors did not delay it for a fortnight, which, in my opinion, was all they could legally do. When the case was first heard before us upon the evidence which was before the Master of the Rolls, I had great doubt whether Mr. *Montgomery* ought not to be held to have been a mere trustee for Mr. *Chappell*, but after hearing the evidence of Mr. *Montgomery*, I think it is

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sufficiently proved, notwithstanding the circumstances of suspicion attending the case, that Mr. *Montgomery* was a real purchaser from Mr. *Chappell*, and not a mere trustee for him. I may add that I do not dissent from the decision in the former case, because, as I understand the facts of the former case, the transfer there was not to a *bonâ fide* purchaser at all, but was a transfer to a person who was a mere nominee of the directors; and the directors having entered into a compromise with those shareholders who wished for a winding-up, took a transfer from the shareholders for the express purpose of relieving them from liability. That, they had no power to do, and I do not dissent from that judgment; though I cannot but dissent from some of the observations that were made in that case, as I have the misfortune to do from the observations made by the Lord Justice in this case.

SIR W. M. JAMES, L.J.:—

The appeal will be refused, but without costs; and I may also add, that I am satisfied upon the evidence that if it had not been for the transfer of the business, and if the company had been a going concern, the assignment to Mr. *Montgomery* would have been a valid assignment.

Solicitors for the Appellant: Messrs. *Chappell & Son.*
Solicitors for the Liquidators: Messrs. *Harper, Broad, & Battcock.*

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AGREEMENT—Not under seal—Corporation—Acquiescence - - - - 551
See Standing by and allowing building.

—— Promoters of company—Adoption by company - - - - - 671
See Promoters of Company.

AMALGAMATION OF COMPANIES — *Winding-up—Sale to new Company—Companies Act*, 1862, *s.* 161 — *Dissentient Shareholder.*] A company which was in difficulties duly passed a resolution for voluntary winding-up, with a view of disposing of its undertaking, which was carried on in *France*, to a French company to be formed for the purpose; and at the same time it passed other resolutions as to the transfer to the French company, and a special resolution altering the articles of association, so as to give power to carry out the arrangement without giving dissentient shareholders the option to receive the value of their shares in cash, as provided by the *Companies Act*, sect. 161. These resolutions, except the resolution for winding-up, were passed irregularly, but no shareholder dissented from them except one fully paid-up shareholder, who applied to the company to pay him the value of his shares, which was refused. He then presented a Petition praying that the company might be wound up compulsorily, or under supervision, or that he might be at liberty to sue in the name of the company to set aside the proposed arrangements, or that the value of his shares might be ascertained and paid. Vice-Chancellor *Malins* having ordered that the value of his shares should be ascertained and paid, and having made no order as to costs, the Petitioner appealed:—*Held*, that the order of the Vice-Chancellor was right, for that the resolution to wind up voluntarily having been regularly passed, the Court would not, on the application of a fully paid-up shareholder, interfere with it by ordering a compulsory winding-up, or a winding-up under supervision, against the wishes of nearly all the shareholders:—*Held*, further, that the winding-up resolution being good in itself, was not invalidated by being associated with resolutions which were not regularly passed; and whether it would have been invalidated, even if those other resolutions had been *ultrà vires*, *quære*:—*Held*, further, that leave to sue in the name of the company had rightly been refused, as the resolutions authorizing a transfer to the French company were not *ultrà vires*, but, though irregular, were capable of confirmation:—*Held*, also, that the special resolution altering the articles while the company was in difficulties, and as a part of the scheme for transfer to the French company, was invalid, and that the Petitioner was entitled to have the value of his shares ascertained and paid, as provided by the *Companies Act*, 1862, s. 161. *In re* Irrigation Company of France. *Ex parte* Fox - - - - - 176

AMALGAMATION OF COMPANIES—*continued.*

2. —— *Transfer of Business—Acceptance of Shares.*] A company agreed, under circumstances which made it doubtful whether the agreement was binding on the shareholders, to transfer its business to a new company, one of the terms of the agreement being, that each shareholder in the old company should become a shareholder in the new company. The shareholders in the old company were accordingly registered as having transferred their shares to the new company, and share certificates in the new company were sent to each shareholder in the old company. Both the companies were afterwards wound up:—*Held* (reversing the decision of *Stuart*, V.C.), that a shareholder who had acknowledged the receipt of the certificates, and had retained them, was a shareholder in the new company:—*Held* (affirming the decision of *Stuart*, V.C.), that a shareholder who had taken no notice of the communication, and had done nothing in relation to the agreement, was not a shareholder in the new company. *In re* Empire Assurance Corporation. Challis's Case. Somerville's Case - - - 266

3. —— *Ultrà vires Agreement carried into effect by means of Winding-up—Companies Act*, 1862, *s.* 161—*Mutual Insurance Company—Bonus to Directors.*] An unregistered company which has no power under its deed of settlement to sell and transfer its business to another company may, nevertheless, carry into effect an agreement for that purpose by registering under the *Companies Act*, 1862, and then passing a resolution for voluntarily winding-up, and directing the liquidator to carry out the agreement.—A mutual insurance company may be amalgamated with, and its business transferred to, another company under the 161st section of the *Companies Act*, 1862.—A clause in an agreement for the amalgamation of two companies, providing that part of the purchase-money shall be paid to the directors of the selling company by way of bonus:—*Held*, not to invalidate the amalgamation.—Decision of the Master of the Rolls affirmed. Southall *v.* British Mutual Life Assurance Society 614

4. —— *Resuscitation of Company—Transfer of Shares—Power of Directors to reject Transferee.*] The *A. Company* entered into an agree-

AMALGAMATION OF COMPANIES—*continued.*

ment with the *M. Corporation* that all its business should be transferred to the corporation, and that its shareholders should be entitled to shares in the corporation in exchange for their shares in the company. But the company was not formally dissolved or wound up. Afterwards the corporation, not being successful, was wound up voluntarily. A few days before the commencement of the winding-up, the former directors of the *A. Company*, in the name of the company, entered into an agreement with the corporation for a retransfer of the principal part of the business of the company, and notice was given to the shareholders that the company had resumed business. A board meeting of the former directors was held in the same month, in which they sanctioned a transfer by *C.*, the solicitor of the company, of 2145 shares for a nominal consideration. By the articles of the company the directors had no power to reject a transfer unless they found a substituted transferee. The company was afterwards wound up, and *C.'s* name was settled by the Master of the Rolls on the list of contributories in respect of those shares:—*Held*, on appeal, by *James*, L.J., that, although the transfer was out and out, and therefore would have been valid if the company had been a going concern, yet, the transfer of the business to the corporation having been completed, the shares were no longer capable of being dealt with, and that the transfer was invalid:—But *held*, by *Mellish*, L.J., that the company not having been formally dissolved or wound up, the shares might still be dealt with, and that the transfer was good.—The decision of the Master of the Rolls affirmed.—The deed of settlement of a company provided that where a shareholder wished to transfer his shares he should leave notice at the office of the company, and that the directors should consider the proposal, and signify their acceptance or rejection of the proposed transferee: and that if they should reject the proposed transferee and should not, within fourteen days, procure some other person to take the shares at the market price, the proposed transferee should be considered as approved by the directors, and should be entitled to take the transfer accordingly:—*Held*, by *Mellish*, L.J., that the directors had not an absolute power to reject a proposed transferee; but could only do so if they could provide a substitute for him. *In re* ACCIDENTAL DEATH INSURANCE COMPANY. CHAPPELL'S CASE - - 902

5. —— *Resuscitation of Amalgamated Company.*] Where a company has transferred all its business and assets to a new company, and the shareholders have accepted shares in the new company, although the old company has never been formally wound up or dissolved, the shares in the old company are incapable of being dealt with, and an attempt by the directors to resuscitate it is nugatory. *In re* ACCIDENTAL DEATH INSURANCE COMPANY. LANKESTER'S CASE 905, n.

—— Life insurance company—Transfer of business - - - 362, 374, 393
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AMENDMENT—Bill and information—Affidavit in support - - - - 853
See AMENDMENT OF BILL. 2.

AMENDMENT—*continued.*

—— Bill by bankrupt Plaintiff—Demurrer—Leave refused - - - 578
See BANKRUPT PLAINTIFF.

—— Bill turned into an information—Motion—Costs - - - - - 141
See COSTS IN THE CAUSE.

—— Bill—Summons for further time - 833
See AMENDMENT OF BILL.

—— Petition for winding-up - - 815
See WINDING-UP PETITION. 2.

AMENDMENT OF BILL—*Practice—Time—Cons. Ord. XXXVII. r.* 18.] A demurrer having been filed to a bill, the Plaintiff served, in due time, an order of course for leave to amend. Two days before the expiration of the time for amending he served a summons for further time to amend, returnable the day after such expiration:—*Held* (affirming the decision of *Bacon*, V.C.), that, as the summons was not returnable till after the expiration of the time originally allowed to amend, the application was too late, there being no special circumstances to induce the Court to depart from the rule laid down by Cons. Ord. XXXVII. r. 18. VERNON *v.* VERNON - - - - 833

2. —— *Practice—Cons. Ord. IX. rr.* 14, 15, 16—*Amendment of Information and Bill.*] An affidavit in support of a special application for leave to amend an information and bill, the amendments of which had been approved by the Attorney-General, was made by the solicitor alone, the Plaintiff not joining:—*Held* (affirming the decision of *Bacon*, V.C.), that the rule that the Plaintiff must join in the case of a bill does not apply to an information and bill; and that the affidavit was sufficient. ATTORNEY-GENERAL *v.* CASTLEFORD LOCAL BOARD OF HEALTH - - 853

ANNUITY FOR LIFE OR PERPETUAL—*Will—Gift of Principal.*] A testator gave to his wife £50 a year, to be paid out of the interest, dividends, and produce arising from his personal property, and gave, after her decease, the said £50 to his two daughters and his granddaughter, or the survivors:—*Held*, on the construction of the will, a gift to the survivors of the principal which would produce the annuity of £50.—Decision of *James*, V.C., reversed. BENT *v.* CULLEN - 235

ANNULLING ADJUDICATION — *Bankruptcy—Bankruptcy Act*, 1869, *s.* 84—*Delegation of Powers of Chief Judge to Registrar.*] Where the creditors fail to appoint a trustee in a bankruptcy by reason of a quorum not being present, the Court ought not to annul the adjudication under the 84th section of the *Bankruptcy Act*, 1869, if one creditor wishes the bankruptcy to proceed, and his debt is so much greater than all the others that he is substantially the only creditor.—Therefore, in a case where the petitioning creditor's debt amounted to £3232, and there were only two other unsecured creditors, whose debts amounted to £67 and £42 respectively, and the petitioning creditor appeared but the two others did not, it was held that the bankruptcy ought to proceed under the Registrar as trustee.—The Registrar sitting as Chief Judge ought only to act in cases where he has the decisions of the Chief Judge or of the Court to guide him. *Ex parte* ENGLISH JOINT STOCK BANK. *In re* FINNEY - - - - - 79

ANTECEDENT DEBT—Mortgage to secure—Company - - - - - 83
See Borrowing Powers.

APPEAL—Admission of fresh evidence - 58
See Injunction in Bankruptcy. 1.

—— Advancing—Irreparable injury - 89
See Advancing Appeal.

—— Bankrupt—Time for appeal - - 546
See Petitioning Creditor.

—— Costs of successful appellant - - 138
See Costs of Appeal.

—— Discretion of Judge in Court below—Leave to proceed - - - - 643
See Leave to proceed after Winding-up.

APPEARANCE—Authority to enter—Retainer of solicitor - - - - 220
See Authority to enter Appearance.

APPORTIONMENT—Condition - - 278
See Apportionment of Condition.

—— Parish charity—Church Building Acts 296
See Division of Parish.

APPORTIONMENT OF CONDITION—*Will—Exoneration.*] A testator directed that a specific sum of £10,000, to which he was entitled, should be applied in paying off a charge on his *B.* estate, if established; and that in case it should be so applied, then a charge of £13,000, to which his *D.* estate was liable, should not be raised thereout, but out of his *B.* estate. After his death, the charge on the *B.* estate having been established, the £10,000 was applied in paying it off. Subsequently, his other personal estate having proved insufficient for payment of his debts, a decree was made for refunding the £10,000 out of the *B.* estate; but it was disputed whether the whole of it was wanted for payment of debts: — *Held* (affirming the decision of *Malins*, V.C.), that the disposition in favour of the *D.* estate was upon a condition which was not apportionable; and that, unless the *B.* estate got the full benefit of the £10,000, the owners of the *D.* estate had no title to throw any part of the £13,000 on the *B.* estate. Caldwell *v.* Cresswell - - - 278

APPROPRIATION OF PAYMENTS—*Debtor and Creditor—Composition—Remitter.*] *H.* was indebted to *T.* on three accounts. On one demand a judgment for a definite sum had been obtained and registered. As to the others, only decrees for an account had been obtained. An agreement was entered into by which the amounts of the unascertained demands were settled, and *T.* agreed to accept, in satisfaction of all three demands, a smaller sum, to be paid by certain instalments, and to be secured in a given way, and in default of any of the instalments being paid to the day, *T.* was to be remitted to his right to recover the whole amount. *H.* paid one instalment, but failed to pay anything further. A bill having been filed by *T.* to enforce his judgment on the real estate of *H.* as against subsequent incumbrancers: —*Held*, by the Master of the Rolls, that the case was governed by the ordinary rule that, where a debtor makes a payment on account without appropriating it, the creditor may appropriate it to which debt he pleases, and that *T.* was therefore

APPROPRIATION OF PAYMENTS—*continued.*
entitled to appropriate the instalment to his unsecured debts; but—*Held*, on appeal, that it must be appropriated to the three debts rateably. Thompson *v.* Hudson - - - 320

ARBITRATION—Award—Mistake—Clerical error
See Mistake in Award. [22

ARTICLE MADE ABROAD—English patent—Implied license - - - 239
See Patent Suit.

ATTACHMENT—Defaulting trustee - 152
See Committal under Debtors Act, 1869.

AUTHORITY TO ENTER APPEARANCE—*Practice—Trustee—Right to defend by separate Solicitor—Banking Company.*] The deed of settlement of a banking company contained a proviso that, where property was vested in trustees, the court of directors should have power to direct any actions or suits to be commenced, prosecuted, or defended, on account of the property of the bank, and to direct the necessary parties to such actions or suits to carry them on or defend them, and that such parties should be indemnified out of the funds of the bank.—*H.*, in whom property was vested as one of the trustees of the bank, and who had executed the deed, was made co-Defendant, with two other trustees, in a suit by persons claiming the property adversely to the bank. The solicitors of the bank entered an appearance for *H.* without his knowledge:—*Held* (affirming the decision of *Malins*, V.C.), on a motion by *H.* to expunge the appearance as irregular, that the provision in the deed of settlement operated as an authority to the bank to use the names of their trustees in any action or suit, and that the solicitor of the bank was entitled to enter an appearance for *H.*, and conduct the defence for him. — But, *semble*, a trustee, under those circumstances, would be entitled to the costs of independent advice for his own security, if he required it, in putting in an answer or affidavit in the suit. Heinrich *v.* Sutton - - - - - - 220

BAILEE—Deposit of stock certificates—Costs of suit caused by negligence—Remoteness of damage - - - - 212
See Remoteness of Damage.

BALANCE SHEET—Company — Delusive statement of accounts - - - 104
See Delusive Balance Sheet.

BANKERS—Lien on shares - - - 818
See Bankers' Lien.

—— Trust account—County treasurer—Set-off
See Bankers' Account. [632

BANKERS' ACCOUNT—*Trust Account—County Rates—County Treasurer—Set-off.*] *G.*, a county treasurer, used to pay the county moneys into the *B. Bank*, but kept his private account at the *N. and P. Bank*, and carried over the police rates to this account by cheques drawn on the *B. Bank*. In February, 1869, he opened a separate account with the *N. and P. Bank*, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The

BANKERS' ACCOUNT—*continued.*

cheques which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the *N. and P. Bank* treated the accounts as one account, and the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened, the manager of the bank knew that *G.* was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. On the 8th of April, 1870, *G.* absconded, his private account being overdrawn, and the police account being in credit:—*Held* (affirming the decision of the Chief Judge in Bankruptcy, who had reversed the decision of the County Court Judge), that the bank was not entitled to set off the one account against the other, but that the county magistrates were entitled to recover the balance standing to *G.*'s credit on the police account. *Ex parte* Kingston. *In re* Gross - - 632

BANKERS' LIEN—*Lien on Shares—Sale of Assets.*] By the articles of association of a bank, the bank would have a lien on the shares of a shareholder for all moneys due to the bank by the shareholder. The bank was wound up, and the assets were sold, one of the terms being that certain shareholders in the bank should be paid £2 a share:—*Held*, that the bank had, on the money so to be paid to a shareholder, a lien for moneys due to the bank by the shareholder. Order of the Master of the Rolls reversed. *In re* General Exchange Bank. *In re* Lewis - - 818

BANKRUPT PLAINTIFF—*Demurrer—Leave to Amend—Costs—Appeal.*] A bankrupt cannot file a bill without previously applying to the Court of Bankruptcy on the subject.—Where a demurrer to a bill by a bankrupt was allowed, but without costs and with liberty to amend:—*Held*, on appeal, that, under the circumstances, costs ought to have been given, and liberty to amend refused.—Order of *Stuart*, V.C., varied. Payne *v.* Dicker - - - - - 578

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BANKRUPTCY—Absconding debtor - 894
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—— Annulling adjudication - - 79
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—— Bill by bankrupt Plaintiff—Demurrer allowed - - - - 578
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—— Debtor summons - - 406, 875
See Debtor Summons. 1, 2.

—— Execution creditor - - 605, 795
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—— Fraudulent preference - - 70
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—— Injunction—Action by creditor of firm 58, 594
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—— Injunction—Effect on creditors *inter se* 795
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—— Joint and separate creditors—Appointment of inspector - - - - 835
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—— Jurisdiction — Composition deed — Injunction - - - - - 842
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—— Jurisdiction—Liquidation by arrangement—Equitable mortgagee - - 555
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—— Liquidation by arrangement—Act of bankruptcy - - - - 605
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—— Majority of creditors—Resolution for liquidation - - - - - 881
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—— Order and disposition—Bills of Sale Act—Formal possession - - - 626
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—— Petitioning creditor's debt—Incomplete bill of exchange - - - - 546
See Petitioning Creditor.

—— Proof—Consignee—Goods on sale or return
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—— Proof—Creditor holding security 388, 455, [838
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—— Proof—Surety—Limited guarantee - 792
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—— Proof—Time of ascertaining amount of debt - - - - - 455
See Creditor holding Security. 2.

—— Scotch sequestration—Shareholder - 582
See Past Members. 1.

—— Shareholder — Proof of liability — Scotch sequestration - .. - 582
See Past Members. 2.

—— Staying proceedings—Debtor summons 602
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—— Trustee, appointment of - - 79
See Annulling Adjudication.

BANKRUPTCY JURISDICTION—*Bankruptcy Act*, 1869—*Equitable Mortgagee.*] Where a trustee has been appointed under a liquidation of the affairs of an equitable mortgagor, the mortgagee may, instead of applying in bankruptcy, proceed in Chancery against the trustee for the purpose of having the security realised, the jurisdiction in Chancery not being taken away by the *Bankruptcy Act*, 1869.—Order of *Stuart*, V.C., reversed. White *v.* Simmons - - - - 555

2.—— *Composition Deed — Bankruptcy Act* 1861, *s.* 136—*Bankruptcy Act*, 1869, *s.* 72—*Injunction.*] The Court of Bankruptcy has jurisdiction, under the *Bankruptcy Act*, 1869, s. 72, to decide all questions necessary to make a complete distribution under a deed of composition registered under the *Bankruptcy Act*, 1861, even though the deed contains no assignment by the debtor of his estate. Two partners, *A.* and *B.*, dissolved partnership on the terms that *A.* should make over all his interest in the partnership property to *B.*, and should be indemnified by him against all the debts. One of the partnership debts was due to a banking company, who held, as security, property of the partnership, and also separate property of *A.* *A.* agreed to make over all his interest in the securities in the hands of the bank to *B.*, to enable him to pay the debts of the partnership.

BANKRUPTCY JURISDICTION—*continued.*

B. afterwards executed a deed of composition with his creditors, which was registered under the *Bankruptcy Act*, 1861, by which it was agreed that the creditors holding securities should only be entitled to a composition on the balance due to them, after giving credit for the value of their securities.—*A.* filed a bill against the bank and *B.*, praying relief against the bank for neglect in realising their securities, and praying for a declaration that if the bank resorted to his separate property—which, he stated, was not intended to be made over to *B.*—he was entitled to have the loss sustained by him made good out of the fund raised under the deed of composition.—Two of the creditors, parties to the deed, applied to the Court of Bankruptcy for an order declaring the rights of all parties in the securities, and to restrain *A.* from taking any proceedings in law or equity with respect to them:—*Held* (affirming the decision of the Chief Judge), that the Court had jurisdiction to decide all questions relating to the securities and the debt due to the bank; but the Court refused to stay the suit in Chancery, as it prayed relief against the bank and *B.*, which could not be obtained under the deed, and varied the Chief Judge's order to that extent. *Ex parte* Rumboll. *In re* Taylor and Rumboll [842

BAPTIST DISSENTERS—Dismissal of minister 489
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BATAVIA — Law of—Marriage contract—Registration—Bankruptcy in *England* - 64
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BILL — Bankrupt plaintiff — Demurrer—Liberty to amend - - - - - 578
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BILL OF EXCHANGE—Authority of one liquidator to accept - - - - 206
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See Creditor holding Security. 1.

BILL OF SALE—Formal possession - 626
See Order and Disposition.

BILL TO PERPETUATE TESTIMONY—*Lunacy—Will of a living Lunatic.*] A wealthy lunatic had made two wills before he was found lunatic. The Court, without giving any opinion whether a bill to perpetuate testimony as to their validity would lie, ordered that such costs as the Master should think proper of a bill to be filed with his approbation for that purpose should be paid out of the lunatic's estate. *In re* Tayleur - 416

BONUS — Improperly declared — Repayment by directors - - - - 104
See Delusive Balance Sheet.

BORROWING POWERS—*Company—Directors—Mortgage by Deposit—Mortgage to secure antecedent Debt.*] The memorandum of association of a company, whose nominal capital was £100,000, stated its objects to be the manufacturing and selling of files and steel, and the doing all such other things (including the acquiring and "disposing of" lands and buildings) as were incidental or conducive to the attainment of those objects. The articles of association provided that the company might, with the sanction of an extraordinary general meeting, borrow on mortgage of its property any sums not exceeding one-half of its nominal capital; and provided that the directors might exercise all such powers of the company as were not, by the *Companies Act*, 1862, or by the articles, required to be exercised by the company in general meeting. The company passed a resolution authorizing a mortgage to the extent of one-third of the nominal capital. A few weeks after this the account of the company with their bankers being overdrawn to the extent of more than £23,000, and the bankers pressing for security, the directors deposited with them the title deeds of the property on which the company carried on their business, and gave a memorandum of deposit under the seal of the company, making the deeds a security for the balance of account up to £25,000. Within six months after this a resolution was passed for winding-up: — *Held* (affirming the decision of *Stuart*, V.C.), that this security was valid.—*Semble*, that, in the absence of any prohibition in the articles, a company may secure a past debt by deposit of title deeds. *In re* Patent File Company. *Ex parte* Birmingham Banking Company - - - - 83

BOUNDARY WALL—Statute of Limitations—Adverse possession - - - 428
See Limitations, Statute of. 1.

BUILDING SOCIETY — Winding-up Petition — *Locus standi* of Petitioner - - 856
See Winding-up Petition. 3.

CAPITAL OR PROFITS—Partnership—Tenant for life and remainderman. - - 503
See Partnership Accounts.

CARRIAGE OR FOOTWAY.] The conveyance to the Plaintiff granted to him a right of way through the gateway of the vendor (which opened into a close afterwards bought by the Defendant), to a wicket-gate to be erected by the Plaintiff at a given point into a piece of garden ground, part of the premises purchased by the Plaintiff. The Plaintiff built a cart-shed on this piece of garden ground close to the point where the wicket-gate was to be, and claimed a right of carriageway to it:—*Held*, by the Master of the Rolls, that the Plaintiff was not confined to a right of footway, but was entitled to a right of way for all purposes. Watts *v.* Kelson - - - 166

CASES—*Accidental and Marine Insurance Company, In re* (Law Rep. 5 Ch. 428), disapproved of - - - - 800
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See RELIGIOUS EDUCATION.

—— *Suffield* v. *Brown* (12 W. R. 356) questioned
See CONTINUOUS EASEMENT. [166

CHARGE—Solicitor—Fund in Court—23 & 24 Vict. c. 127 - - - - 865
See SOLICITOR'S LIEN.

CHARGE OF FRAUD — *Scandal* — *Irrelevancy* — *Costs.*] A Plaintiff, in a bill to enforce against the Defendant an alleged agreement for the compromise of claims of the Plaintiff against the Defendant in respect of certain accounts, charged the Defendant with various frauds in respect of the accounts, such alleged frauds being the ground of the claims included in the compromise. The Plaintiff having failed in proving the agreement, and his bill being dismissed with costs, he was ordered to pay the Defendant's costs so far as they had been increased by the irrelevant charges of fraud as between solicitor and client. FORESTER *v.* READ - - - - - 40

CHARGES AGAINST MINISTER—Baptist congregation—Irregularity - - 489
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See CHARITY NOT EXHAUSTING THE WHOLE INCOME.

—— Parish charity—Apportionment of - 296
See DIVISION OF PARISH.

—— Subscription to, out of lunatic's estate - 226
See SUBSCRIPTIONS TO CHARITY.

CHARITY NOT EXHAUSTING THE WHOLE INCOME—*Repairs*—*Surplus of Rents.*] A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Company of Merchant Taylors*, "to this intent and upon this condition," that the Master and Wardens should every year, out of the rents, provide for twelve poor men and twelve poor women of the city of *London* certain garments of a specified price; and he directed the chamberlain and town clerk of the city of *London* to put the company in mind and see that the garments were given; and

CHARITY NOT EXHAUSTING THE WHOLE INCOME—*continued.*

gave to them for so doing 10*s.* a piece out of the rents; and so that the whole residue of the rents the Master and Wardens should maintain and gather into a stock, and therewith repair, and if need be rebuild the tenements: and in case the Master and Wardens should be remiss and negligent in delivering the said garments, then he willed that the parson, churchwardens, and parishioners of *St. Michael's, Cornhill*, should enter upon the lands and tenements and hold the same, "to this intent and upon this condition," that they should bestow the yearly rents in and upon the garments of the twelve poor men and twelve poor women, and upon the reparation of the tenements, and the said 20*s.* to the chamberlain and town clerk. At the death of the testator the income arising from the tenements was considerably greater than was required for the charitable purposes expressed in the will, and the payment of the 20*s.* to the chamberlain and town clerk; and subsequently the income became very much greater:—*Held*, that the *Merchant Taylors' Company* were not entitled to the surplus income for their own benefit, but were bound to apply it to charitable purposes.—*Attorney-General* v. *Wax Chandlers' Company* (Law Rep. 5 Ch. 503) distinguished and explained.—Decision of the Master of the Rolls affirmed. MERCHANT TAYLORS' COMPANY *v.* ATTORNEY-GENERAL - - 512

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—— Legitimate and illegitimate children - 311
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COMMITTAL UNDER DEBTORS ACT, 1869—*Attachment*—*Defaulting Trustee*—*Possession or Control*—*Principal and Interest*—32 & 33 *Vict. c.* 62, *s.* 4.] Where a trustee has made default in payment of a sum of money ordered by the Court to be paid, and admitted to have been in his possession, an attachment may be issued against him, although he may have spent the money before the order and be unable to pay; and such a trustee is within the 3rd exception of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), s. 4.—For the purpose of bringing a trustee within the 3rd exception of sect. 4 it must appear that the money ordered to be paid by him had at some time been actually in his possession or under his control. Hence no

COMMITTAL UNDER DEBTORS ACT, 1869—*cont.*
attachment can be issued against a trustee on an order directing the payment of a sum composed of principal and interest not distinguished, inasmuch as the interest might not at any time have been in his possession or under his control.—Order of *Stuart*, V.C., discharged. MIDDLETON *v.* CHICHESTER - - - - - - 152

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—— Promoters—Agreement with - - 671
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—— Scrip certificates transferable by delivery
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—— Stock certificates—Deposit for safe custody—Negligence - - - 212
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—— Subscriber of memorandum - - 48
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—— Surplus assets—Distribution of 51, 53, n.
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—— Unregistered life insurance company - 421
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—— Unregistered—Cost-book system—Transfer of shares - - - - 196
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—— Vendor and purchaser—Title to mines—Right to rescind contract - - 91
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COMPROMISE—Contributory in winding-up 43
See COMPROMISE WITH CONTRIBUTORY.

COMPROMISE WITH CONTRIBUTORY—*Winding-up—Past Holder of Shares.*] *A. N.*, a contributory, who was a holder of shares at the date of the winding-up, being unable to pay the calls, an agreement was entered into under the sanction of the Court, by which certain sums of money and a transfer of all the contributory's interest in the company, were to be accepted by the liquidator in full discharge of all claims against the contributory. The agreement contained a stipulation that nothing therein contained should prejudice the right of the company, or of its liquidator or creditors, against any other contributories of the company, whether as present or past members thereof, or otherwise. After this a list of contributories or past members was made out, and the name of *H. N.*, a former holder of *A. N.'s* shares, was placed on the list of contributories as a past member:—*Held* (affirming the decision of the Master of the Rolls), that the compromise with *A. N.* did not take away the liability of *H. N.* to the company, and that *H. N.* was rightly placed on the list as a past member. *In re* NATAL INVESTMENT COMPANY. NEVILL'S CASE - 43

CONCEALMENT OF MATERIAL FACT—*Power of Sale and Exchange—Trustee—Purchase by Tenant for Life.*] A tenant for life of settled estates made an arrangement with a neighbouring landowner for an exchange, subject to certain special

CONCEALMENT OF MATERIAL FACT—*contd.*

terms as to the mines. This was intended to be carried into effect by the trustees of the settlement, who had a power of sale and exchange exercisable at the request of the tenant for life, and the trustees agreed to do so; but, owing to the terms as to the mines, they could not safely effect the exchange under the power, and the tenant for life proposed that he should buy the property which was to have been given in exchange, and effect the exchange himself. He accordingly bought the property, paid the price, and afterwards made the exchange as owner in fee. Another similar transaction took place as to another property, and the tenant for life stated to the trustees, as an inducement to sell to him, that the acquisition of the property which he was going to take in exchange for it, and which was between the settled estate and a railway, would give the mines on the settled property access to the railway. After the death of the tenant for life the remainderman filed his bill against the representatives of the trustees and the devisees of the tenant for life, impeaching the sales to the tenant for life, alleging that they were made at an undervalue; that the tenant for life had concealed from the trustees the value of the mines under the first property; and claiming to have the properties which had been taken in exchange brought into settlement on the ground that the sales were colourable, and only intended as an indirect way of effecting exchanges; or, at all events, that the settled estates might have a way-leave over the property acquired on the second exchange.—The Court was satisfied, on the evidence, that there had been no concealment, and that the tenant for life had given a fair price:—*Held* (affirming the decision of *Stuart*, V.C.), that as a tenant for life, though his consent be requisite to the exercise of a power of sale, stands in no fiduciary position towards the remainderman, and is as free as any one else to buy from the trustees, a sale to him cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate.—Whether a tenant for life purchasing from the trustees is not in a different position from a stranger as regards obligations to communicate what he knows as to the value of the property, *quære*:—*Held*, further, that the statement by the tenant for life as to the access to the mines was a correct statement of a fact, and not a representation that the owners of the settled estates should have a perpetual way-leave over the property taken in exchange. Dicconson *v.* Talbot - - 32

2. —— *Vendor and Purchaser—Mines—Compensation for Coals wrongfully severed—Compensation for Way-leave.*] The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—*Held* (affirming the decision of *Stuart*, V.C.), that the Court would not enforce the contract at the suit of the purchasers, though the sale was not shewn to be at an undervalue:—*Held* (also affirming the decision of *Stuart*, V.C.), in a suit by the landowner, that

CONCEALMENT OF MATERIAL FACT—*contd.*

the landowner was entitled to the value of the coals gotten under his land, with an allowance for raising, but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the Defendants from their own mines and carried under his land.—*A.* and *B.* being tenants in common, *A.*, without any authority from *B.*, contracted for the sale of the estate. *B.*, on being informed of it, objected, and said the price was too low; but a mortgagee threatening to sell the estate under his power unless this sale proceeded, *B.* allowed the matter to go on, and gave no notice to the purchaser that he dissented; an abstract was delivered, and negotiations as to the title went on for about three years.—*Semble*, that it was too late for *B.* to object that the agreement was entered into without his authority. Phillips *v.* Homfray. Fothergill *v.* Phillips. - 770

CONDITION—Apportionment—Exoneration 279
See Apportionment of Condition.

—— Assent to transfer of shares—Guarantee of future calls - - - - 286
See Transfer of Shares. 3.

—— Precedent—Mutual covenants in marriage settlement—Default of one party 610
See Marriage Contract.

CONDITIONS OF SALE – *Vendor and Purchaser—Title—Compensation—Right to rescind.*] Upon a sale of land, one of the conditions provided that if any objection was persisted in, the vendors might rescind the contract; and another condition provided that if any mistake should appear to have been made in the description of the property, or of the vendors' interest therein, such mistake should not vitiate the sale, but compensation should be given.—The purchaser objected that certain minerals under the land appeared to belong to the lord of the manor; the vendors answered that this would not be compensated for, being the result of an enfranchisement as to which there was a condition. The purchaser persisted in the objection, and the vendors gave notice that they should rescind the contract. The purchaser then filed his bill for specific performance with compensation, and the vendors by their answer alleged that they had in fact a title to these minerals, but had rescinded under the conditions:—*Held*, that the objection taken by the purchaser was an objection to title to part of the property sold, the removal of which might involve a long and expensive inquiry; that the vendors had a right to rescind, and that performance with compensation would not be compelled.—Decree of the Master of the Rolls affirmed. Mawson *v.* Fletcher 91

2. —— *Specific Performance—Vendor and Purchaser—Time of the Essence of the Contract—Inquiry as to Title—Waiver of Objections—Objection taken too late—Costs.*] If a vendor does not deliver the abstract of title within the time specified in the conditions of sale, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the objections that time in that respect should be of the essence of the contract. In such a case, the time within which objections will be

CONDITIONS OF SALE—*continued.*

considered as waived will depend upon the general principles of the Court and the conduct of the parties.—Where a decree is made for specific performance of a contract for sale, and an inquiry is directed in general terms whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract; but if the vendor wishes to prevent objections which have been waived before the suit from being renewed under the inquiry, that point should be considered at the hearing, and noticed in the decree.—*Curling* v. *Austin* (2 Dr. & Sm. 129) explained.—Land was described in a contract for sale as freehold, but it was shewn by the abstract that it was formerly copyhold, and had been enfranchised under the Enfranchisement Acts. A decree was afterwards made at the suit of the vendor for specific performance, and a general inquiry directed as to title; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the Enfranchisement Acts:—*Held*, that the objection was fatal to the title; but as the purchaser had taken the objection so late he was not allowed his costs.—Decision of the Master of the Rolls reversed. Upperton *v.* Nickolson - - - - - - 436

3. —— *Vendor and Purchaser—Delusive Condition—Sale by Court of Infants' Reversionary Personal Estate—Jurisdiction.*] A reversionary legacy, in which infants were interested, was sold by an order of the Court in an administration suit.—The particulars of sale stated that infants were interested in the property, and there was a special condition that the purchaser should make no objection on the ground of want of jurisdiction:—*Held* (affirming the decision of *Malins*, V.C.), that the condition of sale was fair and reasonable, and that the purchaser was bound by it.—*Semble*, that the Court had jurisdiction to make the order for sale, and that the infants and all other parties were bound by it. Nunn *v.* Hancock - - - - - - 850

CONFLICT OF LAWS—*Lex loci contractus* and *lex fori* - - - - - - 64
See Lex Loci Contractus.

CONSENT—Power to consent to sale—Tenant for life—Alienation of life estate - 124
See Extinction of Power.

CONSERVATORS OF RIVER—*Public Body—Riparian Proprietors—Evidence.*] Where a public body is, under an Act of Parliament, intrusted with powers and duties for a public purpose, the Court will give credit to them as being the best judges of what they want for that purpose.—A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect.—Decree of the Master of the Rolls affirmed. Attorney-General *v.* Great Eastern Railway Company - - 572

CONSIDERATION—Settlement—27 Eliz. c. 4 228
See Voluntary Settlement.

CONSIGNEE—Goods on sale or return - 397
See Sale or Return.

CONS. ORD. ix. rr. 14, 15, 16 - - 853
See Amendment of Bill. 2.

—— xi. r. 3 - - - - - 151
See Printed Pleadings.

—— xxxvii. r. 18 - - - - 833
See Amendment of Bill. 1.

CONTINGENCY—Death coupled with—Gift over on death before marriage - - 588
See Death coupled with Contingency.

CONTINUOUS EASEMENT—*Easement—Unity of Ownership—Artificial Watercourse—Easement of Necessity—Carriage or Footway.*] In the year 1860 the owner of properties *A.* and *B.* made a drain from a tank on property *B.* to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on property *A.* for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property *A.* to the Plaintiff, with all waters, watercourses, &c., to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof, or as appurtenant thereto. The Plaintiff had the use of the water after his conveyance, until the Defendant, a subsequent purchaser of property *B.*, stopped it:—*Held* (reversing the decision of the Master of the Rolls), that the watercourse was a continuous easement necessary for the use of property *A.*, and would have passed by implication; that the Plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it:—*Held*, further, that the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which the Plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle-sheds.—*Pyer* v. *Carter* (1 H. & N. 916) approved.—*Dicta* in *Suffield* v. *Brown* (12 W. R. 356) questioned.—*Semble*, if the owner of a house and land makes a formed road over the land for the apparent use of the house, and conveys the house separately from the land, with the ordinary general words, a right of way over the road will pass. Watts *v.* Kelson 166

CONTRACT—Agent of company—Deed under seal - - - - - 525
See Contract with Agent of Company.

—— Novation of - - 362, 374, 393
See Novation of Contract. 1, 2, 3.

CONTRACT WITH AGENT OF COMPANY—*Deed under Seal—Claim in Winding-up.*] The managing director of a company, who had power to enter into contracts on behalf of the company, and was bound to give the company the benefit of all such contracts, entered into an agreement with *P.*, by which, in consideration of certain assignments, he bound himself to pay *P.* a sum of money. No mention was made of the company in the deed, but the directors took part in the negotiation, and *P.* was aware that the agreement was made on behalf, and for the benefit, of the company. The company paid money to *P.* on account of the contract, and was afterwards ordered to be wound up:—*Held* (affirming the decision of *Stuart*, V.C.),

CONTRACT WITH AGENT OF COMPANY—*contd.*
that *P.* could not claim against the company under the contract. *In re* INTERNATIONAL CONTRACT COMPANY. PICKERING'S CLAIM - - 525

CONTRIBUTORY—Acceptance of shares - 469
See ACCEPTANCE OF SHARES.

—— Amalgamation—*Ultrà vires* - - 266
See AMALGAMATION OF COMPANIES. 2.

—— Compromise with—Past members - 43
See COMPROMISE WITH CONTRIBUTORY.

—— Co-sureties by separate instruments - 342
See CO-SURETIES.

—— Dissentient shareholders — Purchase of interest by liquidator - - 96
See RECONSTRUCTION OF COMPANY. 1.

—— Paid-up share - - - - 48
See SUBSCRIBER OF MEMORANDUM.

—— Past members—B list - - 582, 800
See PAST MEMBERS. 1, 2.

—— Subscriber of memorandum - - 48
See SUBSCRIBER OF MEMORANDUM.

—— Transfer of shares - 196, 246, 286, 655
See TRANSFER OF SHARES. 1, 2, 3, 4.

—— Unregistered company—Cost-book system—Transfer of shares - - - 196
See TRANSFER OF SHARES. 1.

CONVEYANCE—Execution of—Misdescription of boundaries - - - - 1
See SPECIFIC PERFORMANCE—MISDESCRIPTION.

COPYHOLDERS—Right of common — Sufficient waste - - - - 732
See RIGHT OF COMMON. 2.

COPYRIGHT—Map—Registration - - 346
See COPYRIGHT IN MAP.

—— Pattern—Registration - - - 418
See COPYRIGHT OF DESIGN.

COPYRIGHT IN MAP—*Registration*—5 & 6 *Vict. c.* 45—8 *Geo.* 2, *c.* 13—7 *Geo.* 3, *c.* 38—15 *Vict. c.* 12—*Practice—Costs of Appeal.*] The proprietor of the copyright in a map, whether forming part of or published independently of a book, cannot maintain a suit in respect of any infringement of his copyright until he has registered the map at *Stationers' Hall*, under the provisions of 5 & 6 Vict. c. 45.—Decision of *Malins*, V.C., reversed. —The costs of a successful appeal will not be given in the absence of misconduct on the part of the Respondent. STANNARD *v.* LEE - 346

COPYRIGHT OF DESIGN—*Registration of Pattern —Infringement.*] Where a pattern of an article has been registered under 21 & 22 Vict. c. 70, s. 5, the design will be infringed by an article to all appearance the same, though not actually identical.—Observations in *Holdsworth* v. *M'Crea* (Law Rep. 2 H. L. 380) explained. M'CREA *v.* HOLDSWORTH - - - - - - - 418

CORPORATION—Agreement not under seal—Acquiescence - - - - 551
See STANDING BY AND ALLOWING BUILDING.

COSTS—Appeal—Construction of will - 588
See DEATH COUPLED WITH CONTINGENCY.

—— Appeal—Successful appellant - 346
See COPYRIGHT IN MAP.

COSTS—*continued.*

—— Appeal—Successful appellant - - 138
See COSTS OF APPEAL.

—— Between solicitor and client—Authority of arbitrator - - - - 22
See MISTAKE IN AWARD.

—— Charges of fraud—Irrelevancy - 40
See CHARGE OF FRAUD.

—— Demurrer to bill by bankrupt plaintiff 578
See BANKRUPT PLAINTIFF.

—— Indemnity by solicitor against - 497
See SOLICITOR'S SUIT.

—— In the cause—Motion ordered to stand to the hearing - - - - 141
See COSTS IN THE CAUSE.

—— Respondents to petition—Appearance 64
See RESPONDENTS TO PETITION.

—— Revivor for - - - - 474
See REVIVOR AND SUPPLEMENT.

—— "So far as they have been increased" 869
See TAXATION OF COSTS.

COSTS OF APPEAL—*Practice—Successful Appeal.*] The old established rule, that the Court of Appeal will not give the costs of the appeal to a successful Appellant, except under special circumstances, is still in force. If the Court does not specially give the costs, the Appellant is not entitled to them. DENNY *v.* HANCOCK. (No. 2.) 138

COSTS IN THE CAUSE — *Practice — Motion to stand till the Hearing — Amendment of Bill — Information.*] In a suit to restrain the erection of a jetty in a river, a motion for an injunction was ordered to stand over till the hearing, but no declaration was made as to costs. The Plaintiff then amended the bill, and turned it into an information and bill. When the suit came to a hearing, a decree was made for a perpetual injunction, and the Defendant was ordered to pay the costs of the suit; but the costs of the motion were not mentioned in the decree:—*Held* (affirming the decision of *Malins*, V.C.), that the motion was substantially a successful motion, and that the costs of the motion were costs in the cause: —*Held*, also, that the amendment of the bill, by which it was turned into an information and bill, did not affect the question. MOUNSEY *v.* EARL OF LONSDALE. ATTORNEY-GENERAL *v.* EARL OF LONSDALE - - - - - - - 141

COST-BOOK COMPANY — Transfer of shares to escape liability - - - 196
See TRANSFER OF SHARES. 1.

CO-SURETIES—*Sureties by separate Instruments.*] A bond was executed by a principal and two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the Plaintiff signed a separate undertaking to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the Plaintiff and obtained payment of the amount due. The Plaintiff filed his bill against the solvent surety in the first bond for contribution:—*Held* (affirming the decision of *Malins*, V.C.), that the Plaintiff was entitled to contribution from the Defendant. WHITING *v.* BURKE - - - - 342

COUNTY COURT—Equitable jurisdiction—Transfer to adjoining district - - 359
See County Court Jurisdiction.

COUNTY COURT JURISDICTION—*Equitable Jurisdiction — Suit against Registrar — Transfer into adjoining District*—19 & 20 *Vict. c.* 108, *s.* 21—28 & 29 *Vict. c.* 99, *s.* 21—30 & 31 *Vict. c.* 142, *s.* 8.] The 21st section of the *County Courts Act*, 1856 (19 & 20 Vict. c. 108), which provides that if an action be brought against an officer of a County Court the summons may be taken out in an adjoining district, is applicable to a suit in equity as well as to an action at law.—A bill was filed in the High Court of Chancery to redeem mortgaged property situate in the district of the *S.* County Court. The Defendant was the Registrar of that Court:—*Held* (affirming the decision of *Stuart*, V.C.), that the suit might have been brought against the Defendant in the adjoining district of *H.*; and therefore the Court had jurisdiction, under the 30 & 31 Vict. c. 142, s. 8, to transfer the cause out of the High Court of Chancery to the County Court of *H.* Linford *v.* Gudgeon - - 359

COUNTY TREASURER—Account at bankers — County rates - - - 632
See Bankers' Account.

CREDITOR—Appropriation of payments - 320
See Appropriation of Payments.

—— Secured—Bankruptcy - - 455, 838
See Creditor holding Security. 2, 3.

—— Secured—Winding-up - - - 388
See Creditor holding Security. 1.

—— Shareholder in amalgamated company — Policy of insurance - 362, 374, 393
See Novation of Contract. 1, 2, 3.

CREDITOR HOLDING SECURITY—*Winding-up—Set-off against Dividends—Letter of Credit—Bill of Exchange.*] The *B. Banking Company*, at the request of *L.*, gave to *H.*, who had been instructed to buy cotton for him, a letter of credit authorizing him to draw upon them, the bills of exchange to be accompanied by bills of lading of the cotton to be delivered to them on their accepting the bills. A bill for £7798 was accordingly drawn and accepted by the banking company, and the bills of lading delivered to them. The banking company handed the bills of lading to *L.*, to enable him to obtain an advance. *L.* obtained an advance of £6000 on them from his brokers, and paid the amount into the banking company, who carried it to his account. Before the bill of exchange arrived at maturity, the banking company was ordered to be wound up. After the commencement of the winding-up, but before any claim was sent in upon the bill, the cotton was sold by the brokers, who, after retaining £6000, paid the balance of £574 to the holders of the bill.—The Master of the Rolls allowed the holders to prove for the whole amount of the bill, but directed the £574 to be set off against the dividends payable to them:—*Held* (reversing the decision of the Master of the Rolls), that the £574 could not be set off against the dividends.—But, *semble*, the amount of the proof ought to have been reduced by £574. *In re* Barned's Banking Company. Leech's Claim - 388

2. —— *Bankruptcy Act*, 1861, *s.* 197 — *Creditors' Deed—Proof of Debts.*] The drawer of a bill of exchange made, in 1866, a deed of arrangement with his creditors. The bill had been indorsed to the *B. Company*, and by the *B. Company* to the *D. Company*, and then by the *D. Company* to *L. C.* *L. C.* proved against the estates of the *B. Company* and the *D. Company*, which were being wound up, and received dividends from both, leaving only a small sum due. The liquidator of the *D. Company* paid the remainder, took up the bill, and applied under the drawer's deed of arrangement for a dividend on the whole amount of the bill:—*Held* (affirming the decision of the County Court Judge of *Liverpool*), that, according to the true construction of the *Bankruptcy Act*, 1861, s. 197, creditors are not, for the purpose of ascertaining the dividend to which they are entitled, to be treated as having proved at the time of the registration of the deed, but at the time when they go in to make their claims against the estate; and that the liquidator, therefore, was not entitled to a dividend on the whole amount of the bill, but only for what the *D. Company* had paid upon it. *Ex parte* Joint Stock Discount Company. *In re* Daunt - - - - 455

3. —— *Bankruptcy—Proof—Security, whether on Bankrupt's Property.*] *R. & Co.* consigned goods to *H.* for sale, drew bills on him which they indorsed to *B.*, to whom they handed the bills of lading as a security, and wrote to *H.* asking him to accept the bills as against the goods. *H.* gave an acceptance: "Accepted, payable at the *I. Bank* on the delivery up of the bills of lading." At the time when the bills became payable the affairs of *H.* were in course of liquidation by arrangement:—*Held*, that the conditional acceptance made the security of *B.* virtually a security on property of *H.*, and that *B.* could not prove against the estate of *H.* without deducting the value of the security. *Ex parte* Brett. *In re* Howe - - 838

CREDITORS' DEED—Date of—Registration 413
See Registration of Creditors' Deed.

—— Jurisdiction in bankruptcy — Composition deed without assignment of estate 842
See Bankruptcy Jurisdiction. 2.

—— Proof—Time of ascertaining amount of debt
See Creditor holding Security. 2. [455

CUSTODY OF TITLE DEEDS—Tenant for life—Pending suit - - - 307
See Title Deeds.

CUSTOMS ANNUITY AND BENEVOLENT FUND—*Construction of Act—"Benefit of Children"—Settlement on Child's Marriage.*] The *Customs Annuity and Benevolent Fund* was established by an Act of Parliament in the nature of an insurance fund for the benefit of the widows, children, and other relatives of officers of the Customs, who were expected to subscribe an annual sum towards it out of their salaries. By the Act directors were appointed with power to frame rules for the management of the fund, and with a discretion to admit persons other than relatives of the subscribers as their nominees to the benefit of the fund. It was also enacted that the interest of any claimant on the fund should not be assignable without the consent of the directors.—Rules were drawn up which provided, among other things, that one-third of the portion payable on the death of a subscriber should be set aside for his widow, and

CUSTOMS ANNUITY AND BENEVOLENT FUND —*continued.*
that the remaining two-thirds, or the whole, if he left no widow, "should be applied or paid in any manner or proportion which he might propose for the benefit of his widow, children, or relatives, or his nominees who should have been duly admitted by the directors."—A subscriber, who was a widower, on the marriage of his daughter, appointed his share of the fund to the trustees of her marriage settlement, and directed the trusts to be for his daughter for life, with remainder for her husband for life, with remainder for their issue. He afterwards sent in the names of the trustees as his nominees for admission by the directors; but neither they nor the husband were formally admitted. The daughter died in her father's lifetime, and on the death of the father without having been again married, the directors paid his share of the fund into Court under the *Trustee Relief Act*. The husband presented a Petition for payment of the fund to the trustees of the settlement:—*Held*, by *Malins*, V.C., that the trustees were the proper persons to be admitted as nominees, and that, as the directors had not objected to admit them, they must be held to have been sufficiently admitted for all purposes.—*Held*, on appeal, by the Lords Justices, that the settlement on the daughter, her husband and issue, was a valid application of the fund "for the benefit of his daughter" within the meaning of the rules, and that no admission of the trustees or the husband as nominees, nor any consent by the directors to the settlement, was necessary.—Order of *Malins*, V.C., affirmed. *In re* Pocock's Policy 445

DAMAGE—Remoteness—Costs of suit - 212
See Remoteness of Damage.

DAMAGES—Mining lease—Value of coal - 742
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DATE OF CREDITORS' DEED - - 413
See Registration of Creditors' Deed.

DEATH—Before share transferable - 782
See Death before Share transferable.

—— Condition of—Coupled with a contingency [588
See Death coupled with a Contingency.

DEATH BEFORE SHARE TRANSFERABLE—*Will—Class—Children living at Death of Tenant for Life.*] A testator gave his residuary personalty to a niece for life, and directed his trustees after her decease to pay and divide it unto and amongst all and every the children of his said niece who should be living at the time of her decease, if more than one, equally; and if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my said niece," with maintenance clauses:—*Held* (reversing the decision of *Stuart*, V.C.), that the representatives of children of the niece who attained twenty-one, but died in her lifetime, took no share, for that the words "but not to be transferred until after the decease of my said niece" were not contradictory to the previous expressions confining the class to children who survived the niece, and being in any view of the case surplusage, could not be held to modify the definition of the class.—*Semble*, that the representatives of children surviving the niece and dying under twenty-one, would have taken. Williams *v.* Haythorne. Williams *v.* Williams - 782

DEATH COUPLED WITH A CONTINGENCY—*Will—Absolute Gift at Twenty-five—Gift Over—Time of Vesting—Costs of Appeal.*] A testator bequeathed all he should die possessed of to be equally divided between his two sisters, to be invested in their names as they should direct; one sister (who was then over twenty-five years of age) to have the immediate control of her share, and the other sister upon attaining twenty-five years, until which time it was to be held in trust for her. And in case of the death of either of his sisters before him, or before marrying and having children, the whole of the property to go to the survivor. The elder sister married and had children:—*Held*, that the gift over to the surviving sister, on the contingency of the death of the other before marrying and having children, was referable to such death occurring before she should attain the age of twenty-five years; and that the younger sister, on attaining twenty-five, though still unmarried, became absolutely entitled to a moiety of the property.—Decision of *Malins*, V.C., affirmed.—An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs. Clark *v.* Henry - 588

DEBENTURE—Holder of—Injunction against scheme of arrangement - - 621
See Scheme of Arrangement.

DEBT—Novation of - - 362, 374, 393
See Novation of Contract. 1, 2, 3.

DEBTOR SUMMONS—*Service out of the Jurisdiction—Irish Debtor—Bankruptcy Act*, 1869, *s.* 6—*General Order, January*, 1870, *Rules* 59, 61.] An Irish creditor had recovered judgment in *England* against *L.*, an Irish non-trader, whose residence was in *Ireland*, but who, being Judge Advocate-General, attended at an office in *Westminster*, and being also a Member of Parliament, spent a considerable part of his time in *London*, staying at an hotel. The creditor took out a debtor summons in the English Court of Bankruptcy, on an affidavit that *L.* was resident at the office. *L.* was at this time at his house in *Dublin*, and the creditor obtained from the Registrar an order to serve the summons in *Dublin*. It was served accordingly on the 26th of April. *L.* did not comply with it, but on the 29th of May gave notice of motion to discharge the order of service, and on the 27th of July the Registrar, acting as Chief Judge, refused the motion with costs. The creditor then petitioned for adjudication, and the Registrar, acting as Chief Judge, adjudged *L.* bankrupt. On appeal from the order of adjudication:—*Held*, that the adjudication must be annulled, for that *L.* had not committed an act of bankruptcy, as, upon the true construction of the *Bankruptcy Act*, 1869, and the General Order of January, 1870, a debtor summons cannot be served out of the jurisdiction:—*Held*, also, that *L.* was not estopped by the order of the 27th of July from disputing the jurisdiction to order service abroad.—*Per James*, L.J.: *Semble*, even personal service on *L.* in *England* would have been invalid. *Ex parte* O'Loghlen. *In re* O'Loghlen 406

DEBTOR SUMMONS—*continued.*

2. —— *Neglect to pay or secure Debt—Bankruptcy Act*, 1869, *ss.* 6, 7—*Bankruptcy Rules*, 1870, *Rule* 41.] A creditor, on the 21st of July, 1870, served on a non-trader a debtor's summons for a sum exceeding £50. The debtor filed an affidavit denying the debt, and on the 5th of August obtained the common order that he should give security within seven days, and that on his so doing proceedings should be stayed till the Court in which proceedings should be taken for recovery of the debt had come to a decision. On the 12th of August an order was made by consent giving him a week's further time to complete the security. He never gave the security, and on the 16th of February, 1871, the creditor filed a petition for adjudication, on the ground of neglect to pay, secure, or compound for the debt:—*Held*, that there was a complete act of bankruptcy at the expiration of three weeks from the service of the summons, and that the Petition, not having been filed till more than six months after that time, though within six months from the expiration of the extended time for giving security, was too late.—*Semble*, that if the debt is ultimately paid, the act of bankruptcy is one to which the title of trustees under an adjudication founded on a subsequent act of bankruptcy would not relate back. *Ex parte* Wier. *In re* Wier - **875**

—— Staying proceedings - - - **602**
See Staying Proceedings in Bankruptcy.

DEED—Settlement of company—Execution by shareholders - - - **246**
See Transfer of Shares. 2.

DELUSIVE BALANCE SHEET — *Company — Voluntary Winding-up — Bonus improperly declared—Profits—Companies Act*, 1862, *ss.* 138, 165.] The Court has summary power in a voluntary winding-up, on the application of the liquidator, to make an order under the 138th and 165th sections of the *Companies Act*, 1862, calling upon a director to repay a dividend or bonus declared and paid to him under a delusive balance sheet. —In such a case where a bonus was declared and credited to a director against arrears of calls then due from him, it was held a payment within the section.—Where directors, after proper investigation of the financial position of the company, declare, and the shareholders agree to, a dividend or bonus, the Court will not lightly interfere with the payment of such dividend or bonus on the ground that the estimates on which it was founded have turned out to be erroneous. But where the directors declare a dividend or bonus without proper investigation or professional assistance, and it is afterwards called in question, the burden lies on them to shew that it was fairly paid out of profits; and if they are unable to do so, the Court will order them to refund what they have received.—The directors of a *Marine Insurance Company* declared a bonus of 10*s.* per share, which was agreed to at a general meeting and paid. The directors prepared no profit-and-loss account, but only an account of the receipts and payments of the company, which made no allowance for the risks to which the company was liable. The company having resolved to wind up voluntarily: —*Held* (reversing the decision of the Master of the Rolls), that an order ought to be made on a director to repay the bonus paid to him. *In re* County Marine Insurance Company. Rance's Case - - - - - - **104**

DEMURRER—Bill by bankrupt plaintiff - **578**
See Bankrupt Plaintiff.

DEPOSIT — Stock certificates — Negligence of bailee—Remoteness of damage - **212**
See Remoteness of Damage.

DEPOSIT OF DEEDS—Priority—Negligence **652**
See Priority by Negligence.

DERIVATIVE INTEREST — Election — Next of kin - - - - - - **15**
See Election, Doctrine of. 1.

DIRECTORS—Bargain with—Guarantee of future calls - - - - - **286**
See Transfer of Shares. 3.

—— Duty of — Execution of deed by shareholders - - - - **246**
See Transfer of Shares. 2.

—— Misconduct of - - - - **104**
See Delusive Balance Sheet.

—— Power to reject transferee - - **902**
See Amalgamation of Companies. 4.

—— Profit made by - - - - **558**
See Profit by Director.

—— Qualification of—Paid-up shares - **469**
See Acceptance of Shares.

DISCRETION OF TRUSTEES—*Rights of Cestui que Trust.*] A testator devised his real estate to trustees in trust to pay an annuity of £6000 a year to his daughter, and subject thereto upon trust to accumulate the rents for twenty-one years, and out of the accumulated fund from time to time to pay his debts, legacies, and the incumbrances on the estates, and invest the residue in the purchase of lands to be held on the same trusts; and he directed the estates, on the expiration of the trust for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity of £6000 should be increased to £8000. He gave his residuary personal estate to his trustees upon trust to pay off the incumbrances, and apply the surplus in the same way as the accumulated rents and profits. He died leaving personalty which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, and incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; and they did not for several years pay off all the incumbrances:—*Held* (reversing the decision of the Master of the Rolls), that the trustees were right in paying the annuity at the rate of £8000 a year from the testator's death, and must be allowed it in their accounts. Astley *v.* Earl of Essex - - - - - - **898**

DISMISSAL OF MINISTER—*Chapel—Meeting—Notice—Resolution—Charges.*] By the deed of settlement of a Baptist chapel, it was provided that every minister should be liable to be forthwith removed by the decision of the church made at one meeting, and confirmed at a second meeting called by a notice which should expressly state the object of such meeting. A meeting was called, the notice expressing that it was for the purpose

DISMISSAL OF MINISTER—*continued.*

of bringing charges against, and considering the dismissal of, the minister. The minister did not attend the meeting, and it did not appear that evidence was produced in support of any charges, but the meeting passed a resolution that, in consequence of the minister having done certain specified things, he was not a fit and proper person for the office, and that his office should cease. A second meeting was called, the notice expressing that it was to be for the purpose of confirming and ratifying the resolution passed at the former meeting:—*Held*, that to summon a meeting for the purpose of bringing charges generally, was improper; that if no reason had been given for the dismissal, it might have held good; but that, under the circumstances, it was clear that the meeting had not had the opportunity of exercising a sound discretion in the matter, and the dismissal was invalid:—*Held*, also, that as the notice for the second meeting did not specify the resolution which was to be confirmed, that meeting was unable effectually to confirm the resolution passed at the first meeting.—Decree of *James*, V.C., affirmed.—*Darlington School Case* (12 L. J. (Q.B.) 124; 14 L. J. (Q.B.) 67) questioned. DEAN *v.* BENNETT - - - - - 489

DISSENTERS—Dismissal of minister - 489
See DISMISSAL OF MINISTER.

DISSENTIENT SHAREHOLDER — Purchase of interest by liquidator - - 96
See RECONSTRUCTION OF COMPANY. 1.

—— Sale to another company—*Ultrà vires* resolutions - - - - 176
See AMALGAMATION OF COMPANIES. 1.

DISTRESS AFTER WINDING-UP ORDER—*Companies Act*, 1862, *ss.* 87, 163.] Where a company, being equitable owner of a lease, continues after a winding-up order in the occupation of the leaseholds, and leaves goods upon the land, the landlord is not, by sect. 87 or sect. 163 of the *Companies Act*, 1862, prevented from distraining upon the goods of the company for rent accrued since the winding-up.—Orders of the Master of the Rolls discharged. *In re* LUNDY GRANITE COMPANY. *Ex parte* HEAVAN - - - 462

DISTRIBUTION OF SURPLUS ASSETS—*Winding-up—Fully paid-up Shares.*] By the articles of association of a company the directors were authorized to declare a dividend to be paid to the shareholders in proportion to the number of their respective shares and the amount paid up thereon respectively; and in the prospectus it was stated that the directors reserved power to issue 1000 fully paid-up shares, which were issued accordingly. The shares were of £25, on which the whole £25 was paid by some shareholders and only £20 by the others. Dividends had been paid to the shareholders on the amounts so paid by them respectively:—*Held*, that, in the distribution of the surplus assets of the company after winding-up, the holders of fully paid-up shares were entitled to receive £5 a share before the assets were divided.—Order of *Malins*, V.C., reversed. *In re* HODGES' DISTILLERY COMPANY. *Ex parte* MAUDE. [51

2. —— *Company—Winding-up.*] Before the winding-up of a company some of the shareholders had paid up £5, and others £10 a share:—*Held*, that in the distribution of the surplus assets after all the debts had been paid, £5 must be repaid to each shareholder who had paid £10, and the remainder divided rateably among the shareholders according to the calls which they had paid. *In re* SCINDE, PUNJAUB, AND DELHI CORPORATION 53, n.

DISTRIBUTION OF SURPLUS ASSETS—*contd.*

DIVIDENDS—Winding-up—Set-off against proof
See CREDITOR HOLDING SECURITY. 1. [388

DIVISION OF PARISH—*Charity—Land given for Support of Parish Church—Erection of new Church—Apportionment of Income between old and new Parishes*—8 & 9 *Vict. c.* 70, *s.* 22.] An estate had been held from time immemorial by the churchwardens of a parish for the repairs of the church, and the rent of one field was originally applied to the repairs of the church clock. In 1820 a new church was built, and the income of the charity was carried to the general account of the churchwardens, and applied in aid of the church-rates for both churches. In 1846 the parish was divided under an Order in Council, and a new parish carved out of it, and assigned to the new church. Thenceforward each parish had its own church-rate, and the income of the charity was applied exclusively in aid of the rates for the old parish church. On a Petition by two of the inhabitants of the new parish for an apportionment of the charity between the two parishes under 8 & 9 Vict. c. 70, s. 22:—*Held* (affirming the decision of the Master of the Rolls), that the charity, being for the support of the fabric of a particular church, could not be apportioned. *In re* CHURCH ESTATE CHARITY, WANDSWORTH - - - 296

DOUBTFUL TITLE—Specific performance - 124
See EXTINCTION OF POWER.

EASEMENT—Continuous—Artificial watercourse
See CONTINUOUS EASEMENT. [166

—— Way—Carriage or footway - - 166
See CARRIAGE OR FOOTWAY.

EDUCATION—Religion of father—Examination of child by Court - - - 539
See RELIGIOUS EDUCATION.

ELDEST SON—*Deed—Construction—Younger Son—Vesting.*] A father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail:—*Held* (affirming the judgment of the Master of the Rolls), that the rule of construction was the same as to realty and personalty, and that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates. *In re* BAYLEY'S SETTLEMENT - - 590

ELECTION, DOCTRINE OF—*Derivative Interest—Next of Kin.*] A lady, having a power of appointment over the reversion expectant on her own decease in a trust fund in favour of any of her issue, to be executed before her children had all attained twenty-five, made within that period an appointment by deed among her three sons equally. By her will and codicils she purported to appoint the fund to her eldest son; and one of her sons having died intestate, she gave benefits

ELECTION, DOCTRINE OF—*continued.*
out of her own property to her other surviving son and the children of the deceased son. All her children attained twenty-five in her lifetime. It having been decided that the fund belonged to the two surviving sons, and the estate of the deceased son, according to the appointment by deed, the eldest son filed his bill to put his surviving brother and the children of his deceased brother to their election. It was not shewn whether, at the time of the death of the testatrix, the estate of the deceased son had been wound up; but it ultimately became unnecessary to resort to his interest in the fund in question for payment of his debts:—*Held* (reversing the decision of *Stuart*, V.C.), that not only the surviving younger son, but the children of the deceased brother, were put to their election; but that, if the debts of the deceased son had not all been paid at the death of the testatrix, an apportioned part of them ought to have come out of the fund.—*Grissell* v. *Swinhoe* (Law Rep. 7 Eq. 291) explained. COOPER *v.* COOPER - - - - 15

2. ——*Scotch Heir—Will—Devise of "All my Real Estate situate in any part of the United Kingdom or elsewhere."*] A testator devised "all the residue of my real estate situate in any part of the *United Kingdom* or elsewhere." The testator had real estate in *Scotland* as well as *England*:—*Held* (reversing the decision of the Vice-Chancellor of the Duchy of *Lancaster*), that the heir-at-law taking the Scotch lands by descent was put to his election. ORRELL *v.* ORRELL - 302

3. —— *Will—Second Election.*] A testatrix devised "all and singular the estate and mines of *A.*" to trustees in trust for sale, and gave to *T. D.* £10,000, which was to be taken in full satisfaction of any sums which she might owe him at her decease, and to *W. D.* £3000, which she declared was to be taken in satisfaction of any rent-charge out of a certain part of her real estate. Her will contained the usual devise of trust and mortgage estates. She was in possession of the entirety of the *A.* estate, but was owner only of one moiety, being in possession of the other moiety by virtue of a mortgage, the money due upon which was subject to trusts, under which *T. D.* and *W. D.*, on her death, became entitled each to one fifth:—*Held* (affirming the decision of the Master of the Rolls), that *T. D.* and *W. D.* were put to their election between the benefits they took under the will and their shares in the mortgage money. WILKINSON *v.* DENT - 339

EQUITABLE MORTGAGE—Rights of mortgagee under liquidation—Bill in Chancery 555
See BANKRUPTCY JURISDICTION. 1.

ESTOPPEL—By deed—Term to secure annuity—Relief in equity - - - 147
See ESTOPPEL BY DEED.

—— Receipt in full discharge - - 527
See RECEIPT IN FULL DISCHARGE.

ESTOPPEL BY DEED—*Term at Law—Jurisdiction.*] A settlor, by deed, purported to grant an annuity out of certain land, and to grant a term of 100 years to a trustee to secure the annuity. At that time the settlor had not the legal estate, which was outstanding in mortgagees. The settlor died, devising to his three sons, who paid off the

ESTOPPEL BY DEED—*continued.*
mortgage, and the mortgagees conveyed the estate to the uses of the will. The devisees then sold to a purchaser without notice of the annuity. The annuitant filed a bill against the trustee of the term and the purchaser to recover the annuity:—*Held*, that the annuitant had no remedy in equity against the purchaser, but might compel the trustee to proceed at law and establish his title, if any, against the purchaser.—*Semble*, the devisees would not be estopped from denying the grant of the term. CLEMOW *v.* GEACH - - 147

EVIDENCE—Appeal—Admission of fresh evidence - - - - 58
See INJUNCTION IN BANKRUPTCY. 1.

—— Presumption of death - - - 356
See PRESUMPTION OF DEATH.

—— Presumption that public body are best judges of what is wanted for public purposes - - - - 572
See CONSERVATORS OF RIVER.

—— Winding-up—Summons under Companies Act, 1862, s. 115 - - - 145
See WITNESS IN WINDING-UP.

EXCLUSIVE APPOINTMENT—*Residuary Bequest—Appointment in pursuance of Covenant.*] A testatrix, having power to appoint by will a certain fund amongst all and every of her children, and other children, covenanted to appoint a certain sum to one child. She then, by her will, appointed that sum, and appointed other parts of the fund to certain objects of the power, and bequeathed and appointed all the estate over which she had a disposing power to one object of the power. There were other objects of the power:—*Held*, that all the appointments were bad, as being exclusive.—*Semble*, an appointment made by will, in pursuance of a covenant to appoint, would not be invalid.—*Quære*, whether damages could be recovered for breach of such a covenant.—Decision of *Malins*, V.C., reversed. BULTEEL *v.* PLUMMER. [160

EXECUTION—Debenture holder—Injunction—Railway company - - - 621
See SCHEME OF ARRANGEMENT.

EXECUTION OF DEED—Company's deed of settlement—Execution by shareholders 246
See TRANSFER OF SHARES. 2.

EXECUTION CREDITOR—*Bankruptcy Act*, 1869, *ss.* 6, 125—*Liquidation—Act of Bankruptcy—Filing Petition for Liquidation—Vesting in Trustee.*] The filing of a Petition for liquidation by arrangement in the form prescribed by the Bankruptcy Rules, 1870, is an act of bankruptcy, and the vesting of the debtor's goods in the trustee relates back to the filing of the Petition; so that an execution creditor, with notice of the Petition, cannot seize the goods of the debtor, and hold them as against a subsequently appointed trustee.—Order of *Bacon*, C.J., affirmed. *Ex parte* DUIGNAN. *In re* BISSELL - - - - 605

2. —— *Bankruptcy—Seizure—Sale—Injunction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 13, 95.] After the sheriff, acting under a writ of *fi. fa.*, had seized the goods of a debtor, the debtor presented to the County Court a Petition for liquidation by arrangement, thereby commit-

EXECUTION CREDITOR—*continued.*

ting an act of bankruptcy, and on the same day obtained an injunction restraining the sheriff from proceeding to a sale. The sheriff, however, sold the goods, and paid the balance of the proceeds of the sale into the County Court :—*Held* (reversing the decision of *Bacon*, C.J.), that the execution creditor, and not the trustee under the liquidation, was entitled to the money in Court. —An injunction granted under the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 13, is merely for the protection of the debtor's estate, and has no effect on the rights of the creditors *inter se*. *Ex parte* Rocke. *In re* Hall - - - 795

EXONERATION — Conditional — Apportionment of condition - - - 278
See Apportionment of Condition.

EXTINCTION OF POWER—*Power of Sale with consent of Tenant for Life—Extinction of Power to consent by Alienation of Life Estate—Vendor and Purchaser—Doubtful Title.*] The trustees of settled estates had a power of sale, to be exercised at the request and direction of *H.*, the tenant for life, who was also entitled to the ultimate reversion in fee. *H.* made an absolute conveyance of all his interest to *A.* for value. Subsequently the trustees, by the direction of *H.*, purported to exercise the power of sale by conveying the estates to *A.* :—*Held* (reversing the decision of the Master of the Rolls), that *H.*'s power to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee :—*Held*, also, that there was nothing in the sale of the interest of the tenant for life, and the subsequent exercise of the power of sale to the assignee of the life interest, to raise suspicion of *mala fides*, or to put a purchaser on inquiry.—Observations on the duty of the Court to decide doubtful points of title in suits for specific performance. Alexander *v.* Mills - - 124

FIDUCIARY RELATION—Purchase by tenant for life - - - - - 32
See Concealment of Material Fact. 1.

FOOTWAY OR CARRIAGEWAY - - 166
See Carriage or Footway.

FORECLOSURE—Final order—Receipt of rents by mortgage - - - 645
See Sale at Undervalue.

FORGED TRANSFER—Costs of suit—Remoteness of damage - - - - 212
See Remoteness of Damage.

FORMAL POSSESSION—Bills of Sale Act 626
See Order and Disposition.

FRAUD—Bankruptcy—Fraudulent preference 70
See Fraudulent Preference.

—— Charge of—Irrelevancy—Costs - 40
See Charge of Fraud.

—— Patent obtained by fraud - - 274
See Similar Invention. 2.

—— Sale at undervalue - - - 645
See Sale at Undervalue.

FRAUDULENT PREFERENCE—*Bankruptcy Act*, 1869, *s.* 92.] In October, 1869, a creditor visited his debtor's place of business, and seeing that the business was misconducted asked him to pay off the money. The debtor proposed to give security

FRAUDULENT PREFERENCE—*continued.*

on a certain property, but the property being insufficient it was arranged that the creditor should take it in satisfaction of part of his debt; and on the 6th of December the debtor and creditor went to a solicitor and instructed him to draw a conveyance accordingly. Owing to the illness of the solicitor the matter was delayed and the conveyance was not executed till the 3rd of February, 1870. On the 22nd of March the debtor filed a petition for liquidation :—*Held* (affirming the decision of *Bacon*, C.J.), that as the conveyance was executed in pursuance of the verbal agreement made in December in consequence of the application of the creditor, it was not, according to the cases decided under the old law, a fraudulent preference; and that the *Bankruptcy Act*, 1869, s. 92, does not avoid as a fraudulent preference an act which was not such under the old law. *Ex parte* Tempest. *In re* Craven and Marshall - 70

—— Company—Mortgage in contemplation of winding-up - - - 83
See Borrowing Powers.

FREEHOLDERS OF MANOR—Rights of common —Exercise of—Loss by neglect - 716
See Right of Common. 1.

—— Right to sue on behalf of others - 716
See Right of Common. 1.

—— Right to sue on behalf of copyholders—Misjoinder - - - - 732
See Right of Common. 2.

GENERAL RULES IN BANKRUPTCY, 1870—Rule 41 - - - - 875
See Debtor Summons. 2.

—— Rules 59, 61 - - - - 406
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—— Rule 65 - - - - - 894
See Absconding Debtor.

—— Rule 143 - - - - 546
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—— Rule 260 - - - - - 58
See Injunction in Bankruptcy. 1.

—— Rules 260, 289 - - - - 594
See Injunction in Bankruptcy. 2.

—— Rules 273, 275, 293 - - - 881
See Majority of Creditors.

GIFT, ABSOLUTE OR IN TRUST—*Will — Construction—Family.*] A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will gave a part of the testator's estate to an illegitimate son of one of the testator's sons :—*Held*, that the gift was valid.—Decree of *Malins*, V.C., affirmed. Lambe *v.* Eames - - - - - 597

GREAT-NEPHEWS—Nephews—Gift to class [351
See Nephews and Great-nephews.

GUARANTEE—Future calls—Conditional assent to transfer of shares - - 286
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—— Limited - - - - - 792
See Limited Guarantee.

HEIR-AT-LAW—Election by—Scotch heir 302
See Election, Doctrine of. 2.

HUSBAND AND WIFE—Batavian marriage contract—English bankruptcy - 64
See Lex Loci Contractus.

—— Marriage contract—Covenants in settlement—Default of one party - - 610
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—— Separation deed - - - 701
See Separation Deed.

ILLEGALITY — Separation deed — Custody of children - - - - 701
See Separation Deed.

ILLEGITIMATE CHILDREN — *Class — Will — Construction—Necessary Implication—A Gift to Children may by force of the Context include both legitimate and illegitimate Children.*] A testator gave a legacy to "my son-in-law, *J. C.*," and gave leaseholds to trustees upon trust "during such part of my term and interest therein as my daughter *Mary*, the wife of the said *J. C.*, shall happen to live," to pay the rents to her for her separate use, "independently of her present or any after-taken husband;" and after her death directed them to stand possessed of the leaseholds for such of her children as she should by will appoint; and in default of appointment, for her children who should attain twenty-one, or, being a daughter or daughters, marry under that age. The testator's daughter *Mary* had, with the testator's assent, gone through the ceremony of marriage with *J. C.*, who had been her deceased sister's husband. There were two children of this marriage, born before the date of the will, who were recognised by the testator as his grandchildren, and at the time of the making the will the testator's daughter was *enceinte* of another child, who was born after the testator's death:—*Held* (reversing the decision of *Stuart*, V.C.), that the two eldest children were entitled to take under the gift to children, no opinion being given as to whether the child, who was in *ventre sa mère* at the date of the will, and at the testator's death, could also take. Crook *v.* Hill - - 311

IMPLICATION—Illegitimate children included in gift to children - - - 311
See Illegitimate Children.

—— Licence to use patented article—Article made abroad - - - 239
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INDEMNITY—By solicitor against costs of suit [497
See Solicitor's Suit.

INFANT—Reversionary interest in personalty—Sale by Court—Conditions of sale 850
See Conditions of Sale. 3.

INFORMATION—Amendment of - - 853
See Amendment of Bill. 2.

INJUNCTION—Bankruptcy—Effect on creditors *inter se* - - - - 795
See Execution Creditor. 2.

—— Execution by debenture holder - 621
See Scheme of Arrangement.

—— Interference with watercourse—Board of Health - - - - 483
See Subterranean Watercourse.

—— Railway company — Taking water from river - - - - - 572
See Conservators of River.

INJUNCTION IN BANKRUPTCY—*Liquidation by Arrangement—Petition by one Partner—Injunction to restrain Action against the Firm—Lord Mayor's Court—Bankruptcy Act*, 1869, *ss.* 13, 125—*Gen. Ord. Bkcy.*, 1870, *Rule* 260—*Appeal—Admission of fresh Evidence.*] Where one partner of a firm files a petition for liquidation by arrangement under the 125th section of the *Bankruptcy Act*, 1869, the Court has no jurisdiction to restrain an action by a creditor of the firm against all the partners.—The Court has power to grant an injunction under the 13th section of the *Bankruptcy Act*, 1869, on the application of the receiver under a liquidation by arrangement, before a trustee has been appointed.—The Court will refuse to permit fresh evidence to be used on an appeal if the party tendering it had the opportunity of using it in the Court below, but omitted to do so. *Ex parte* Isaac. *In re* De Vecchj 58

2. —— *Bankruptcy Rules*, 1870, *Rules* 260, 289—*Bankruptcy of one of two Joint Debtors.*] Two partners accepted a bill of exchange. After this they dissolved partnership, and shortly afterwards one of them filed a petition for liquidation by arrangement. A resolution for liquidation was passed by the creditors, and a trustee chosen. Immediately after this the holder of the bill commenced an action against both acceptors, and they pleaded a joint plea that they never accepted the bill. After notice of trial had been given the trustee applied for an injunction to restrain further proceedings against the liquidating debtor in the action, and the Registrar, sitting for the Chief Judge, granted an injunction accordingly:—*Held*, on appeal, that rule 289 of the Bankruptcy Rules, 1870, did not make it imperative on the Court to grant an injunction, but left the Court a discretion:—*Held*, further, that though it would have been proper to restrain the Plaintiff from proceeding against the insolvent acceptor if the injunction had been applied for at once, the proper course, under the circumstances of the case, was to allow the action to proceed, and only to restrain the Plaintiff from enforcing his judgment against the property or person of the insolvent acceptor. *Ex parte* Mills. *In re* Manning [594

INQUIRY AS TO TITLE—Form of—Specific performance - - - - 436
See Conditions of Sale. 2.

INSOLVENCY—Test of—Winding-up petition—Building society - - - 856
See Winding-up Petition. 3.

INSPECTORS—Bankruptcy—Appointment 835
See Joint and Separate Creditors.

INSTROKE—Coal mine - - - 742
See Mining Lease.

INSURANCE COMPANY—Transfer of business [362, 374, 393
See Novation of Contract. 1, 2. 3.

INVESTMENT — Compensation under Lands Clauses Act—Reinvestment - 887
See Reinvestment of Purchase-money.

IRISH DEBTOR—Service out of the jurisdiction [406
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IRREGULARITY—Meeting to dismiss dissenting minister - - - - 489
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IRREGULARITY—*continued.*

—— Transfer of shares—Lapse of time - 246
See TRANSFER OF SHARES. 2.

IRRELEVANCY—Charge of fraud—Costs - 40
See CHARGE OF FRAUD.

ISSUES—Patent suit—Before hearing of cause
See SPECIFICATION OF PATENT. [706

JOINT AND SEPARATE CREDITORS—*Bankruptcy—Conflict of Interest—Appointment of Inspectors.*] One member of a firm was adjudicated bankrupt under the Act of 1861, the others being out of the jurisdiction, and there was no joint adjudication. The joint creditors proved debts to many times the amount of the separate debts, and appointed as assignees one joint creditor and the nominee of another. Separate estate was got in to an amount sufficient for payment of a large dividend on the separate debts; but no joint estate had been got in. A separate creditor, with the assent of nearly all the other separate creditors, applied for an order that a meeting of separate creditors might be held for appointing an inspector to protect their interests:—*Held*, that the Acts of 1849 and 1861 had not taken away the power of appointing such an inspector, and that the separate creditors ought to be at liberty to appoint one; but that he must not take any steps without the sanction of the Registrar. *Ex parte* MELBOURN. *In re* MELBOURN - 835

JOINT MORTGAGEES — Acknowledgment—Statute of Limitations - - - 478
See LIMITATIONS, STATUTE OF. 2.

JOINT TENANCY OR TENANCY IN COMMON—*Will—Codicil—Construction—"Participate."*] A testator by his will appointed *A.* and *B.* his executors and trustees, and after providing a fund for the payment of his debts and legacies, and all legacy duties, gave his residuary estate to his trustees for their absolute use and benefit. By a codicil he appointed *C.* an additional executor and trustee of his will, and declared that the residuary bequest should be read as if the names of *A.*, *B.*, and *C.* were inserted instead of the names of *A.* and *B.*, "so that *C.* should participate in such bequest free from legacy duty, with *A.* and *B.*" *A.* died before the testator:—*Held* (affirming the decision of *Stuart*, V.C.), that the effect of the codicil was to make *A.*, *B.*, and *C.* tenants in common of the residue, and that *A.'s* share lapsed to the next of kin. ROBERTSON *v.* FRASER - - - - - - 696

JOINT TENANTS—Adverse possession - 789
See LIMITATIONS, STATUTE OF. 3.

—— Will—Direction that they should "participate" - - - - 696
See JOINT TENANCY OR TENANCY IN COMMON.

JOINTURE—Succession duty—Death of jointress
See SUCCESSION DUTY. [501

JUDGMENT CREDITOR — Debenture holder — Railway company - - - 621
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JURISDICTION—Bankruptcy—Power to decide question under composition deed 842
See BANKRUPTCY JURISDICTION. 2.

JURISDICTION—*continued.*

—— Bankruptcy—Liquidation by arrangement—Equitable mortgagee - - 555
See BANKRUPTCY JURISDICTION. 1.

—— Chancery—Grantee of annuity secured by term—Estoppel - - - 147
See ESTOPPEL BY DEED.

—— County Court - - - - 359
See COUNTY COURT JURISDICTION.

—— Sale by Court of infants' reversionary personal estate - - - - 850
See CONDITIONS OF SALE. 3.

—— Sanction of Court of Chancery to reconstruction of company - - 381
See RECONSTRUCTION OF COMPANY. 2.

LANDLORD AND TENANT—Distress for rent on railway company - - - 462
See DISTRESS AFTER WINDING-UP ORDER.

LAPSE—Death of legatee—Presumption - 356
See PRESUMPTION OF DEATH.

—— Void gift to charity—"Rest of my lands at *H.*" - - - - 333
See RESIDUARY GIFT.

LARGENESS OF CLAIM—Patent - - 706
See SPECIFICATION OF PATENT.

LEASE—Agreement for—Corporation—Standing by and allowing building - 551
See STANDING BY AND ALLOWING BUILDING.

LEAVE TO PROCEED AFTER WINDING-UP.] Where the Judge in whose Court a company is being wound up has, under the *Companies Act*, 1862, s. 87, given leave to a Plaintiff to proceed with a suit against the company, the Court of Appeal will not interfere with the discretion of the Judge. THAMES PLATE GLASS COMPANY *v.* LAND AND SEA TELEGRAPH CONSTRUCTION COMPANY - - - - - 643

LEGACY—Ademption—Satisfaction - 136
See ADEMPTION.

LEGAL ESTATE — Term to secure annuity — Estoppel—Jurisdiction of Chancery 147
See ESTOPPEL BY DEED.

LEX FORI—Bankruptcy in *England*—Contract in *Batavia* - - - - 64
See LEX LOCI CONTRACTUS.

LEX LOCI CONTRACTUS—*Conflict of Laws—Lex Fori—Contract made in Batavia—Bankruptcy in England—Registration.*] *M.* and his wife, who were married in *Batavia*, entered into a contract before the marriage, by which a sum of 75,000 guilders was settled on the wife for her separate use. By the law of *Batavia* no marriage contract excluding a community of goods has any effect as regards third parties until registered in the Courts of that country. The contract in question was never registered.—*M.* and his wife subsequently came to *England*, where *M.* became bankrupt, and his wife claimed to prove against his estate for the sum settled:—*Held*, that the provision of the law of *Batavia* respecting registration did not affect the validity of the contract, but only the remedy of those claiming under it: that all questions of priority of creditors must be determined by the law of the country where the

LEX LOCI CONTRACTUS—*continued.*

bankruptcy takes place; and therefore that *M.'s* wife was not precluded by the non-registration of the deed from proving for the sum settled *pari passu* with the other creditors. *Ex parte* Melbourn. *In re* Melbourn - - - 64

LIEN—Bankers—Shares in bank - - 818
See Bankers' Lien.

—— Solicitor—Charge under 23 & 24 Vict. c. 127
See Solicitor's Lien. [865

LIFE INSURANCE—Customs Annuity and Benevolent Fund - - - 445
See Customs Annuity and Benevolent Fund.

—— Policy transferred to another office [362, 374, 390
See Novation of Contract. 1, 2, 3.

LIFE INSURANCE COMPANY—Registration 421
See Unregistered Life Insurance Company.

LIGHT AND AIR—*Prescription*—2 & 3 *Will.* 4, *c.* 7, *s.* 3—*Twenty Years—Unity of Possession—Tenant.*] A right to the access and use of light to a house cannot be acquired, under 2 & 3 Will. 4, c. 71, s 3, by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend.—During such period of unity of occupation the running of the twenty years under the statute is only suspended.—*Semble*, the owner in fee of land demised for a term of years is subject to any right to access and use of light over his land which may be acquired by the owner of an adjoining house during the demise.—Decree of *Stuart*, V.C., reversed. Ladyman *v.* Grave - - - - - - 763

2. —— *Prescription—Amount of Interference.*] The *Prescription Act* (2 & 3 Will. 4, c. 71) has not altered the law as to the nature and extent of light to which the owner of an ancient light is entitled.—The owner of an ancient light is entitled to prevent his neighbour from obstructing the access of light, so as to render the house possessing the ancient light substantially less fit for occupation.—Decision of *Bacon*, V.C., affirmed. Kelk *v.* Pearson - - - - 809

LIMITATIONS, STATUTE OF—*Boundary Wall—Specific Performance—Costs.*] The purchaser of a house in *London* having taken various objections to the title, the vendor filed a bill for specific performance, and obtained the usual reference as to title. All the above objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the *East India Company*, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them:—*Held*, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adverse to the *East India Company*:—*Held*, that the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, and that therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs. — Decision of *Malins*, V.C., reversed. Phillipson *v.* Gibbon - - - - - - 428

2. —— (3 & 4 *Will.* 4, *c.* 27), *s.* 28—*Mortgagees—Acknowledgment—Joint Mortgagees—Trustees—Redemption.*] *Held* (affirming the decree of *Malins*, V.C.), that an acknowledgment of the title of a mortgagor given by one only of two joint mortgagees, who, on the face of the mortgage deed, were shewn to advance the money on a joint account as trustees, did not keep alive the right of redemption either as against the whole property or against a moiety of it, but was wholly inoperative. Richardson *v.* Younge - 478

3. —— *Wrongful Possession—Joint Tenancy.*] A testator devised a copyhold in 1796 to *R. W.* for life, with remainder to her children as tenants in common, without words of limitation. *R. W.*, who had three children, let the property to her two sons, *R. L.* and *B.*, and after the death of *R. L.* to his son *R.* and *B.*, who occupied the estate together till the death of *R. W.* in 1841. On *R. W.'s* death the property—subject, as to one-third, to *B.'s* life estate—belonged in moieties to *R.* and *X.*, as the co-heirs of the testator. *R.* and *B.* continued to occupy the whole property as owners, and farmed it at their equal expense, till the death of *B.* in 1862, after which it was similarly farmed by *B.'s* son and *R.* till 1869, when *B.'s* son died. The devisee of *B.'s* son afterwards filed a bill for a partition:—*Held* (affirming the decision of *Malins*, V.C.), that *R.* and *B.*, as regarded that third share, of which their possession became wrongful on the death of *R. W.*, must be considered as joint tenants; and that as *B.* had died first, his interest in the estate had determined, and the Plaintiff had no title. Ward *v.* Ward - - - - - - 789

4. —— 21 *Jac.* 1, *c.* 16—9 *Geo.* 4, *c.* 14—*Acknowledgment—Promise to pay—Letter written "without prejudice."*] *M.* agreed with a company to build for them, at specified prices, certain ships, to be delivered at certain times, and to be paid for by certain instalments. In case of delay in delivery of the ships, certain fortnightly sums were to be paid as liquidated damages, and the company were to be at liberty to deduct them from the unpaid purchase-money. The agreement contained a provision for referring all disputes to arbitration. The ships having been supplied, *M.*, who had received some instalments, sent in at the end of 1861 an account, shewing the final balance which he claimed. The company insisted that he was liable to deductions for delay to an amount exceeding this balance, and that nothing was due to him. A correspondence ensued, and the com-

LIMITATIONS, STATUTE OF—*continued.*

pany proposed, pursuant to the stipulations of the contract, to refer the dispute to arbitration; and in 1863, a draft reference having been approved, they named an arbitrator on their part, but *M.* would not name one on his. On the 19th of February, 1867, the managing director wrote to *M.* saying that *M.'s* account omitted all the deductions to which the company were entitled, and which would leave the balance in their favour, but that they were still willing to have all questions decided by arbitration, according to the contract, and called on *M.* to concur in referring them. This letter was expressed to be "without prejudice." *M.* did not answer this letter, nor take any steps to proceed to arbitration. A petition to wind up the company was presented in October, 1869, and an order made. *M.* claimed to prove for his balance, which was resisted, on the ground of the *Statute of Limitations*:—*Held* (reversing the decision of *Bacon*, V.C.), that the above letter did not contain an acknowledgment taking the case out of the *Statute of Limitations*, for that—(1) It did not contain any admission of a debt, since under the contract the liquidated damages were a deduction from the price, and not merely matter of set-off; and, *semble*, even the admission of a debt, if coupled with a claim to a set-off of larger amount, would not take a case out of the statute, as no promise to pay could be implied from it.—(2) Nor did it contain any unconditional promise to pay.—(3) Nor did it contain any promise to pay upon a condition which had since been performed; for on its fair construction it contained at most only a promise to pay what should be found due on an arbitration under the contract, if *M.* named an arbitrator within a reasonable time, which he had not done.—*Semble*, that as the letter was expressed to be without prejudice, and the proposal contained in it was not accepted, it could not be used against the writer. *In re* RIVER STEAMER COMPANY. MITCHELL'S CLAIM - - 822

LIMITED GUARANTEE—*Bankruptcy—Surety.*] *J. H.* gave to *B.* a guarantee: "I hereby guarantee to you the payment of all goods you may supply to *E. H.*, but so as my liability to you under this or any other guarantee shall not at any time exceed the sum of £250." *E. L.* gave a similar guarantee. *B.* supplied goods to *E. H.* to the amount of £657. *E. H.* then became bankrupt. *B.* proved for the whole sum, and then called on the guarantors, who paid him £250 each. *B.* having afterwards received a dividend of 2*s.* 1*d.* in the pound on the £657:—*Held* (reversing the decision of *Stuart*, V.C.), that each of the guarantors was entitled to a part of this dividend, bearing to the whole the same proportion as £250 to £657. HOBSON *v.* BASS. - - - 792

LIQUIDATION BY ARRANGEMENT—Act of bankruptcy—Vesting of property in trustees - - - - - 605
See EXECUTION CREDITOR. 1.

—— Equitable mortgagee—Bill in Chancery 555
See BANKRUPTCY JURISDICTION. 1.

—— Injunction against action by creditor of firm - - - - 58, 594
See INJUNCTION IN BANKRUPTCY. 1, 2.

LIQUIDATION BY ARRANGEMENT—*continued.*

—— Resolution for adjournment — Requisite majority - - - - 881
See MAJORITY OF CREDITORS.

LIQUIDATORS—*Company—Acceptance of Bill by one Liquidator—Companies Act*, 1862, *s.* 133.] The four liquidators of a company passed a resolution that one of them should have power to accept bills of exchange. They afterwards resolved that bills to the amount of £7500, which had been accepted to the credit of *C.*, should be renewed. Fresh bills were accordingly drawn and accepted by one liquidator:—*Held* (affirming the decision of *Stuart*, V.C.), that the acceptances were invalid.—*Ex parte Birmingham Banking Company* (Law Rep. 3 Ch. 651) commented on.—Whether, under any circumstances, liquidators can authorize one of their number to sign a bill in their name, *quære*. *In re* LONDON AND MEDITERRANEAN BANK. *Ex parte* AGRA AND MASTERMAN'S BANK [206

—— Purchase of interest of dissentient shareholder—Companies Act, 1862, s. 161 97
See RECONSTRUCTION OF COMPANY. 1.

LOCAL BOARD OF HEALTH—Interference with watercourses - - - - 483
See SUBTERRANEAN WATERCOURSE.

LORD MAYOR'S COURT—Injunction to restrain action in—Bankruptcy - - - 58
See INJUNCTION IN BANKRUPTCY. 1.

LUNACY—Subscriptions to charity out of lunatic's estate - - - - 226
See SUBSCRIPTIONS TO CHARITY.

—— Will of lunatic—Bill to perpetuate testimony - - - - 416
See BILL TO PERPETUATE TESTIMONY.

MAJORITY OF CREDITORS—*Liquidation by Arrangement — Adjournment — Majority — Bankruptcy Act*, 1869, *s.* 16, *sub-s.* 7—*Bankruptcy Rules*, 1870, *Rules* 273, 275, 293.] At a meeting of creditors held under a petition for liquidation, an adjournment was proposed, and a resolution for adjournment was signed, but only by a number of creditors forming somewhat less than a majority in value of all the creditors who had handed in their proofs. The adjourned meeting was held, and resolutions for liquidation passed. The Registrar refused to register them, being of opinion that the adjournment was ineffectual, and the adjourned meeting therefore irregular. The Chief Judge ordered the resolutions to be registered, being of opinion that, under sect. 16 of the *Bankruptcy Act*, 1869, the majority required was not a majority of creditors present, but of creditors present and voting; and that, in the present case, the majority of those present had not voted either way:—*Held*, on appeal, that a resolution for adjournment requires to be passed with the same formalities as other resolutions; and that every creditor who has handed in his proofs, and does not sign the resolution, must be taken to have voted against it, unless he withdraws his proofs under rule 273; in which case, for the purposes of the proposed resolution, he is to be considered not present at the meeting:—

MAJORITY OF CREDITORS—*continued.*

Held, therefore, that the resolution for adjournment was not duly passed, and the adjourned meeting not duly held. *Ex parte* Orde. *In re* Horsley - - - - - 881

MANOR—Right of common—Building on waste—Bill by freeholder - - 716
See Right of Common. 1.

—— Right of common—Sufficient waste - 732
See Right of Common. 2.

MARRIAGE ARTICLES—Default of one party in keeping covenants - - - 611
See Marriage Contract.

MARRIAGE CONTRACT—*Marriage Articles—Default by one Party—Condition precedent.* By articles made previously to a marriage, the wife's father covenanted to make certain payments during his life, and to settle three-tenths of his real and personal estate at his death upon the husband and wife during their respective lives, and after their death on their issue; and the husband covenanted to insure his life and to settle the policy, and also other property, in like manner. In default of issue, the property settled by the husband was to revert to him. The marriage took place, and the wife died without issue, and afterwards the father died. The husband did not insure his life or settle his property as agreed, and refused to execute the settlement which had been drawn in pursuance of the articles.—A suit having been instituted for the administration of the father's estate, the husband claimed to prove for the value of his life interest in three-tenths of the father's real and personal estate:—*Held* (affirming the decision of the Master of the Rolls), that it was no answer to husband's claim that he had refused to perform his part of the agreement, inasmuch as the contract between the parties had been partly performed by the marriage, and the performance by the husband was not a condition precedent to the performance by the father. The claim was therefore allowed. Jeston *v.* Key - - 610

MEETING—Dissenting congregation—Irregularity - - - - 489
See Dismissal of Minister.

MIDDLESEX REGISTRY ACT—*Priority—Notice to Solicitor—Communication to Client—Fraud.*] A solicitor induced a client to advance money for *A.*, on mortgage of lands in *Middlesex*, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered:—*Held* (reversing the decision of the Master of the Rolls), that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority. *Kennedy* v. *Green* (3 My. & K. 669) distinguished. Rolland *v.* Hart - - - - - 678

MINE—Lease—Colliery—Instroke—Way-leave—Continuous working - - 742
See Mining Lease.

MINE—*continued.*

—— Sale of—Concealment of fact that purchaser had abstracted coal - - 770
See Concealment of material Fact.

—— Title to—Right to rescind contract - 91
See Conditions of Sale. 1.

MINING LEASE—*Instroke—Trespass—Damages—Value of Coal—Barrier—Passage of Air and Water—Way-leave—Continuous Working.*] A tenant for life, with certain powers of leasing, demised the seams and veins of coal under a piece of land for twenty-one years, and for sixty years if the tenant for life had power so to do; with liberty for the lessee to search for, dig, raise, and sell the coal, and to make any pits or works, and to take surface land, paying for the damage; and the lessee covenanted to work the mines in a proper and workmanlike manner, and to deliver up at the end of the term the works, seams, and veins of coal in good repair and condition, so that the said coal works might be continued. The lessees worked the demised coal by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, and did not sink a pit so as to work the demised coal from the deep.—They kept no barrier between the two collieries, so that water and air passed from their other colliery through the demised colliery into a lower colliery.—They also continued to work the demised coal after the expiration of the lease for twenty-one years, claiming to be entitled for sixty years; which claim was, after much litigation, decided to be invalid as against the reversioner:—*Held*, that, under the circumstances, working by instroke was working in a proper and workmanlike manner, and that the lessees were not bound to sink a separate pit for the demised coal:—That the value of the coal raised by the lessees after the expiration of the twenty-one years' lease was to be paid for by them at its fair market value, as if they were purchasers, all expenses of hewing and raising being allowed:—That, under the terms of the lease, the lessees were not liable to damages for not working the coal continuously:—That the lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for way-leave or air-leave:—That the lessees were liable for any damage done beyond the removal of coal by working the mine since the determination of the twenty-one years' lease, and must also pay for way-leave or for the passage of coal through the lessor's mine since the determination of the lease.—Decree of the Master of the Rolls affirmed, with variations. Jegon *v.* Vivian 742

MINISTER—Baptist—Dismissal of - 489
See Dismissal of Minister.

MISTAKE—Award - - - - 22
See Mistake in Award.

—— Misdescription of boundaries in map—Vendor and purchaser - - 1
See Specific Performance—Misdescription.

MISTAKE IN AWARD—*Correction of Clerical Error—Costs as between Solicitor and Client—Laches—Acquiescence.*] An arbitrator having signed his award is *functus officio*, and cannot alter the slightest error in it, even though such

MISTAKE IN AWARD—*continued.*
error has arisen from the mistake of the clerk in copying the draft. The proper course in such a case is to obtain an order to refer the award back to the arbitrator.—An arbitrator made his award on the 12th of November. His attention having been called by the Plaintiff's solicitor to an accidental omission in it, he signed a fresh award on the 2nd of December, which was sent by the Plaintiff's solicitor to the Defendant with a letter of explanation. The Defendant took no notice of it till the 10th of June, when the Plaintiff sought to enforce the award, and he then objected to its validity;—*Held*, that the Defendant was entitled to treat the second award as a nullity, and that his delay did not amount to acquiescence in its validity.—The decision of *Bacon*, V.C., reversed. —An arbitrator, to whom the matters at issue in a suit, including the costs of the cause, have been referred by the Court of Chancery, has power to award costs as between solicitor and client. MORDUE *v.* PALMER - - - - 22

MORTGAGE—Bankrupt mortgagor—Liquidation by arrangement—Bill in Chancery 555
See BANKRUPTCY JURISDICTION. 1.

—— Company — Deposit to secure antecedent debt - - - - - 83
See BORROWING POWERS.

—— Foreclosure—Final order—Receipt of rent by mortgagee - - - 645
See SALE AT UNDERVALUE.

—— Priority — Negligence — Deposit of part of deeds - - - - 652
See PRIORITY by NEGLIGENCE.

—— Registration in *Middlesex*—Priority - 678
See MIDDLESEX REGISTRY ACT.

—— Statute of Limitations — Acknowledgment by one of two joint mortgagees - 478
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MOTION—Reserved till the hearing—Costs 141
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MUTUAL INSURANCE COMPANY—Winding-up —Sale of business - - - 614
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NEGLIGENCE—Mortgage — Deposit of part of deeds—Priority - - - 652
See PRIORITY BY NEGLIGENCE.

—— Remoteness of damage—Costs of suit 212
See REMOTENESS OF DAMAGE,

NEPHEWS AND GREAT-NEPHEWS — *Will — Construction — Words — Great-nephews sharing with Nephews.*] A testator gave the proceeds of the sale of an estate to his great-nephew *G. W.*, and to such other of his nephews and nieces as should be living at his own or his sister's decease equally. In one place in his will the testator called one of his great-nephews his nephew, but in all other places he called them great-nephews:—*Held* (reversing the decision of *Stuart*, V.C.), that nephews and nieces must be confined to their primary signification, so as not to include great-nephews and great-nieces. *In re* BLOWER'S TRUSTS - - - - 351

NEXT OF KIN—Election—Derivative interest 15
See ELECTION, DOCTRINE OF. 1.

NOTICE—Solicitor—Communication to client 678
See MIDDLESEX REGISTRY ACT.

NOVATION OF CONTRACT—*Company—Winding-up—Amalgamation of Companies—Life Assurance Company—Transfer of Business—Receipt of Bonus —Payment of Premiums.*] In 1860 the *M. Life Insurance Company* became amalgamated with, and transferred its business to, the *A. Company*. By the agreement between the two companies it was provided that the policy-holders in the *M. Company* should be invited to substitute for their existing policies other policies to be issued by the *A Company* on the same terms; that the policy-holders entitled to participate in profits who should accept new policies from the *A. Company* should, instead of their old rights, be entitled to share in the next and all subsequent bonuses to be declared by the *A. Company;* and that the policy-holders who should decline to accept substituted policies should be entitled to keep their old policies on foot by paying the premiums to the *A. Company*, who undertook the liabilities of the *M. Company* in respect thereof. A circular was sent to the policy-holders of the *M. Company*, informing them of the amalgamation and the agreement, and inviting them to accept substituted policies, or, in case the policies had been assigned, to have them indorsed by the *A. Company*.—In 1862 the *A. Company* declared a bonus; and a circular was sent to the policy-holders of the *M. Company* who were entitled to a participation in profits, announcing the bonus, and giving them the option of three ways in which they might take their share of the bonus.—*S.*, a policy-holder, with participation in profits, in the *M. Company*, received the circular announcing the amalgamation with the *A. Company*, and did not apply for a substituted policy, but paid his subsequent premiums to the *A. Company*. He also received the circular announcing the bonus, and elected to take his share of the bonus in the form of reduced premiums, which he paid to the *A. Company* till it was ordered to be wound up. The *M. Company* was also ordered to be wound up, and *S.* claimed to prove as a creditor against the estate:—*Held* (affirming the decision of *Bacon*, V.C.), that the acceptance by *S.* of the bonus from the *A. Company* effected a novation of his contract for insurance, and that he could no longer claim as a creditor of the *M. Company*. *In re* MEDICAL, INVALID, AND GENERAL LIFE ASSURANCE SOCIETY. SPENCER'S CASE - - - - - - 362

2. —— *Company—Winding-up—Amalgamation of Companies—Life Assurance Company—Transfer of Business—Indorsement of Policy—Payment of Premium.*] In 1860 the *M. Life Assurance Company* became amalgamated with, and transferred its business to, the *A. Company*. By the agreement between the two companies, it was provided that the policy-holders in the *M. Company* should be invited to substitute for their existing policies other policies to be issued by the *A. Company* on the same terms, and that the policy-holders who should decline to accept substituted policies should be entitled to keep their old policies on foot by paying the premiums to the *A. Company*, who undertook the liabilities of the *M. Company* in respect thereof. A circular was sent to the policy-holders of the *M. Company* informing them of the amalgamation and the agreement, and inviting them to accept substituted policies; or, in case the policies had been assigned, to have them

NOVATION OF CONTRACT—*continued.*

indorsed by the *A. Company.*—*G.* effected policies of assurance on his life, without participation of profits, in the *M. Company*, which were afterwards assigned to *R.* The circular announcing the amalgamation of the companies was received by *R.* In 1865 the secretary of the *A. Company* applied to *R.* to send in his policies to be indorsed, which *R.* did; and the secretary sent him a form for his signature, by which he was to assent to the transfer of the liability upon the policies to the *A. Company*. *R.* refused to sign this document, and the policies were accordingly returned to him without indorsement. He continued to pay the premiums to the *A. Company* till it was wound up.—The *M. Company* was also ordered to be wound up, and *R.* claimed to prove as a creditor against the estate:—*Held* (reversing the decision of *Bacon*, V.C.), that no novation of the contract for insurance had been effected, either by payment of premiums or by sending in the policies for indorsement, and that *R.* was entitled to claim as a creditor against the *M. Company*. *In re* Medical, Invalid, and General Life Assurance Society. Griffith's Case - .. - - - - - 374

3. —— *Amalgamation of Companies — Life Assurance Company—Transfer of Business—Creditor a Shareholder in the new Company.*] The *N. Fire Assurance Company* and the *N. Life Assurance Company* were amalgamated with the *B. Assurance Company*; and a deed of settlement was executed by which the *B. Company* was constituted as a common law partnership. The deed recited the agreement by which the businesses of the *N. Fire* and *N. Life Companies* were transferred to the *B. Company*, and the *B. Company* undertook to indemnify them against all liabilities.—*F.* was a policy-holder in the *N. Life Company*, and was also a shareholder in the *N. Fire Company*, and as such shareholder executed the deed of settlement of the *B. Company*, and received shares in the *B. Company* in exchange for his shares in the *N. Fire Company*.—The *B. Company* and the *N. Life Company* were afterwards ordered to be wound up, and *F.* claimed to prove as a creditor against the estate of the *N. Life Company*:—*Held*, that *F.*, having executed the deed of settlement of the *B. Company*, had accepted the liability of that company, and could not claim as a creditor against the *N. Life Company*.—The decision of *Bacon*, V.C., affirmed, on additional evidence. *In re* National Provincial Life Assurance Society. Fleming's Case - - - - - - - 393

OBJECTIONS TO TITLE—Waiver of—Inquiry as to title. - - - - 436
See Conditions of Sale. 2.

ONUS OF PROOF—Patent suit—Article made abroad - - - - 239
See Patent Suit.

ORDER AND DISPOSITION—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36)—*Apparent Ownership—Formal Possession.*] On the 29th of November, *L.*, the holder of an unregistered bill of sale of the household furniture of *H.*, took possession by sending in a broker's man, who remained in the house and slept in an upper room, but did not remove any of the furniture nor interfere with the use of it by *H.*, who went on using it exactly as before.

ORDER AND DISPOSITION—*continued.*

On the 19th of December placards were posted in the neighbourhood of the house announcing a sale of the furniture on the 28th, but, with the exception of a reference to a firm of solicitors for particulars, there was nothing in the placards from which it could be inferred that the sale was not made by *H.* himself. On the 23rd *H.* committed an act of bankruptcy, and was adjudged bankrupt on the following day:—*Held* (affirming the decision of the Registrar), that the goods belonged to the trustee in bankruptcy, as being in the apparent, if not the actual, possession of the bankrupt, for that the possession taken by the broker's man was merely "formal possession," within the meaning of the *Bills of Sale Act*, 1854; and that the placards could not take the furniture out of the bankrupt's apparent possession, as they did not shew that the sale was to be made under a bill of sale. *Ex parte* Lewis. *In re* Henderson 626

PAID-UP SHARES—Qualification of directors 469
See Acceptance of Shares.

—— Holders of surplus assets - - 51
See Distribution of Surplus Assets.

—— Subscriber of memorandum - - 48
See Subscription of Memorandum.

PARENT AND CHILD—Father's right to custody of children - - - - 701
See Separation Deed.

PARISH — Division of — Apportionment of charity - - - - - 296
See Division of Parish.

PARTITION—Sale—Discretion of Court - 685
See Partition Suit.

PARTITION SUIT — *Sale — Partition-Act*, 1868.] An estate, comprising a first-class mansion, with a park of nearly 300 acres, above 3000 acres of agricultural land, and a manor, the rights of which extended over about thirty square miles, belonged to the Plaintiffs and Defendants in moieties. The Plaintiffs filed a bill for a partition, and asked for a sale, adducing evidence, which was not contradicted, to shew that, in the circumstances of the case, the property would in all probability fetch a much higher price if sold as a whole than the allotted parts would sell for after a partition. The Defendants strongly objected to a sale:—*Held*, by *Malins*, V.C., that, under sect. 4 of the *Partition Act*, 1868, the Court had a discretion, and that a sale would not be ordered against the wish of the owners of a moiety where there were no circumstances rendering a partition specially inconvenient:—*Held*, on appeal, that a sale must be ordered, for that sect. 4 is imperative, and obliges the Court to order a sale where the owners of a moiety ask for it, unless the objecting parties will purchase, under sect. 5, the shares of the parties asking a sale, or the Court sees some good reason why a sale should not be ordered. Pemberton *v.* Barnes - - - - - - 685

PARTNERSHIP—Bankruptcy—Petition for liquidation by one partner—Action against firm - - - - 58
See Injunction in Bankruptcy. 1.

—— Bankruptcy—Petition for liquidation by one partner—Action against firm - 595
See Injunction in Bankruptcy. 2.

PARTNERSHIP—*continued.*

—— Profits carried to capital—Tenant for life and remainderman - - - 503
See PARTNERSHIP ACCOUNTS.

PARTNERSHIP ACCOUNTS—*Tenant for Life and Remainderman — Capital — Profits.*] A testator gave to his wife a life interest in his one-seventh of a colliery in which he was a partner. By the deed of partnership, the majority in value of the partners had power to dispose of the profits by adding them to the capital or dividing them between the partners or carrying them to the separate accounts of the partners. For several years profits were made, but retained to the credit of a profit and loss account. Afterwards profits were divided, but at the death of the tenant for life a large sum remained to the credit of the profit and loss account, the greater part of which had been sunk in the works of the colliery:—*Held*, that, under the circumstances, the share of the testator in the sum standing to the credit of the profit and loss account belonged to the persons entitled in remainder, and not to the executor of the tenant for life.—Order of *James*, V.C, varied. STRAKER *v.* WILSON - - - - 503

PAST MEMBERS — *Company — Winding-up — Bankrupt Shareholders — Scotch Sequestration — Companies Act*, 1862, *ss.* 38, 75, 77.] The liability of a past member of a company in liquidation, who is placed on the B list of contributories, is capable of being proved as a debt under the bankruptcy of such contributory if the bankruptcy takes place after the commencement of the winding-up; and the bankrupt, on obtaining his discharge, is entitled to be removed from the list of contributories. The fact that the B list is not made out till after the adjudication of bankruptcy makes no difference.—The same doctrine is applicable to a Scotch sequestration as to an English bankruptcy.—Decision of the Master of the Rolls reversed. *In re* LAND CREDIT COMPANY OF IRELAND. MCEWEN'S CASE - - - 582

2. —— *Company — Winding-up—Release of Debts—Call.*] *B.*, being on the B list of past members, brought up and caused to be released to the company all the debts which were due by the company when he ceased to be a shareholder and which remained due at the winding-up:—*Held*, that though the money raiseable from the A list would be insufficient to pay the debts, no call could be made upon *B.*—*In re Accidental and Marine Insurance Corporation* (Law Rep. 5 Ch. 428) disapproved of.—Order of the Master of the Rolls affirmed. *In re* BLAKELY ORDNANCE COMPANY. BRETT'S CASE - - - - 800

—— Compromise with contributories of Class *A.* [43
See COMPROMISE WITH CONTRIBUTORIES.

PATENT—Assignment of—Article made abroad —Implied license - - - 239
See PATENT SUIT.

—— Similar invention—Second patent 272, 274
See SIMILAR INVENTION. 1, 2.

—— Specification—Largeness of claim - 706
See SPECIFICATION OF PATENT.

PATENT SUIT—*Onus of Proof—Article manufactured Abroad—Implied License.*] In a suit to restrain the sale of a patented article, it is incumbent on the Plaintiff not only to prove the sale, but to prove that the article was not made by himself or his agents.—Where the owner of a patent manufactures and sells the patented article in a foreign country as well as in *England*, the sale of the article in one country implies a license to use it in the other. But if he has assigned his patent in either country, the article cannot be sold so as to defeat the rights of the assignee.—The owner of an English patent manufactured the patented article in *France* as well as in *England*. In a suit to restrain the sale of the article in *England*, the Plaintiff proved that it was not made at his manufactory in *England*, but could not prove that it was not made at his manufactory in *France*.—The bill was dismissed with costs.—The decision of *James*, V.C., affirmed. BETTS *v.* WILLMOTT - - - - 239

PATTERN—Registration of - - - 418
See COPYRIGHT OF DESIGN.

PAYMENTS—Appropriation of - - 320
See APPROPRIATION OF PAYMENTS.

PERMANENT IMPROVEMENTS—New buildings —Repairs—Compensation under Lands Clauses Act—Re-investment - 887
See RE-INVESTMENT OF PURCHASE-MONEY.

PETITION—Costs of Respondents - .. 77
See RESPONDENTS TO PETITION.

—— Re-investment—Compensation under Lands Clauses Act - - - - 887
See RE-INVESTMENT OF PURCHASE-MONEY.

—— Winding-up - - 641, 815, 856
See WINDING-UP PETITION. 1, 2, 3.

PETITIONING CREDITOR—*Bankruptcy—Bill of Exchange—Bankruptcy Act*, 1869—*Practice—Time for Appeal—General Rules in Bankruptcy*, 1870, *Rule* 143.] The rule that the debt on which an adjudication of bankruptcy is founded must be a debt which existed at the time of the act of bankruptcy, is not altered by the *Bankruptcy Act*, 1869.—An acceptance was written on an incomplete bill of exchange, to which no drawer's name was affixed. The acceptor soon afterwards assigned all his property for the benefit of his creditors. Some weeks after this the bill, which had remained in the hands of the acceptor's agent, was completed and indorsed to a *bonâ fide* holder for value, who, on its being dishonoured, obtained an adjudication in bankruptcy against the acceptor, grounded on the assignment as an act of bankruptcy:—*Held*, on appeal, that the adjudication must be reversed, as no debt existed on the bill till it was issued, which was after the act of bankruptcy.—An adjudication having been made against three partners, two of them appealed. The cases of all three were identical. The third, who had not appealed within the time fixed by the General Rules in Bankruptcy, 1870, was allowed to appeal, and the adjudication was annulled against all three. *Ex parte* HAYWARD. *In re* HAYWARD - - - - 546

PLEADING — Bill by bankrupt plaintiff — Demurrer - - - - 578
See BANKRUPT PLAINTIFF.

—— Misjoinder—Freeholders and copyholders of manor - - - - 732
See RIGHT OF COMMON. 2.

POLICY—Transfer to another office 362, 374, *See* Novation of Contract. 1, 2, 3. [393

POSSESSION OR CONTROL—Defaulting trustee - - - - - 152
See Committal under Debtors Act, 1869.

POWER—Appointment in pursuance of covenant *See* Exclusive Appointment. [160

—— "Benefit of children"—Settlement on daughter's husband - - 445
See Customs Annuity and Benevolent Fund.

—— Extinction of—Alienation of life estate 124
See Extinction of Power.

—— Sale or exchange—Purchase by tenant for life - - - - - 32
See Concealment of material Fact. 1.

PRACTICE—Advancing appeal—Irreparable injury - - - - - 89
See Advancing Appeal.

—— Amendment of bill—Summons for further time - - - - - 833
See Amendment of Bill. 1.

—— Amendment of information and bill—Affidavit in support - - - 853
See Amendment of Bill. 2.

—— Amendment of winding-up petition - 815
See Winding-up Petition. 2.

—— Appeal—Admission of fresh evidence 58
See Injunction in Bankruptcy. 1.

—— Appeal—Bankruptcy—Time - - 546
See Petitioning Creditor.

—— Bankruptcy—Service out of the jurisdiction
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—— Bankruptcy—Staying proceedings—Debtor summons - - - - 602
See Staying Proceedings in Bankruptcy.

—— Demurrer to bill by bankrupt plaintiff—Leave to amend refused - - 578
See Bankrupt Plaintiff.

—— Lunacy—Bill to perpetuate evidence of will of living lunatic - - - 416
See Bill to perpetuate Testimony.

—— Partition suit—Sale - - - 685
See Partition Suit.

—— Patent suit—Granting of issues before hearing - - - - 706
See Specification of Patent.

—— Printing pleadings—Cons. Ord. ix., rule 3—Weight of paper - - - 151
See Printing Pleadings.

—— Revivor for costs - - - 475
See Revivor and Supplement.

—— Schedule to bill - - - - 477
See Schedule to Bill.

—— Solicitor—Authority to enter appearance 220
See Authority to enter Appearance.

—— Specific performance—Form of inquiry as to title - - - - - 436
See Conditions of Sale.

PRESCRIPTION—Light and air - 763, 809
See Light and Air. 1, 2.

—— Right of common—Loss by neglect - 716
See Right of Common. 1.

PRESUMPTION OF DEATH—*Legatee not heard of for Seven Years.*] Where a legatee has not been heard of for seven years, his death will be presumed; and the onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof, the legacy will be paid to the residuary legatee or the next of kin of the testator, as the case may be.—Order of *Malins*, V.C., affirmed. *In re* Lewes' Trusts. [356

PRINTING PLEADINGS—*Practice—Cons. Ord. ix. rule* 3.] The paper on which the pleadings in Chancery are printed must be of the quality prescribed by Cons. Ord. ix. rule 3, but need not be weighed in the Office of the Record and Writ Clerks in order to ascertain the quality.—The margin of the printed pleadings should be of the size prescribed; but a pleading with a margin somewhat smaller may by order be filed.—By Cons. Ord. ix. rule 3, bills are to be printed on paper 19 lbs. per mill ream, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide; and by rule 3 of Gen. Ord. of 6th of March, 1860, answers are to be printed in the same way. It was stated that a practice had lately been adopted in the Record and Writ Clerks' Office of weighing bills and answers, and refusing to file them when the individual sheets did not weigh the full proportionate part of the required weight of the ream. Calthrop *v.* Rummens - - - 151

PRIORITY—Mortgage—Deposit of part of deeds *See* Priority by Negligence. [652

—— Mortgage—Registration - - 678
See Middlesex Registry Act.

PRIORITY BY NEGLIGENCE—*Equitable Mortgage—Deposit of Part of Deeds—Legal Estate.*] An equitable mortgagee, with whom some of the title deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, filed a bill to establish his priority over a subsequent legal mortgagee, whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed, and purported to contain all the title deeds, but contained only the earlier deeds:—*Held*, that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge, so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee.—Decree of the Master of the Rolls affirmed. Ratcliffe *v.* Barnard - - - - - 652

PROFIT BY DIRECTOR—*Company—Trustees.*] By the articles of association of a financial company, it was provided that a director should vacate his office if he participated in the profits of any work done for the company without declaring his interest at a meeting of the directors. A director having undertaken to obtain money for certain railway debentures at 5 per cent. commission, offered them to the company at 1½ per cent. commission. The offer came before a committee of directors, of which he was not a member, and they recommended the board to accept the offer. The recommendation came before a board meeting of the directors, at which the director making the offer was present. He stated that he was

PROFIT BY DIRECTOR—*continued.*
interested in the matter, and proposed to retire, but was told by the chairman that it was unnecessary, and the offer was accepted by the board. The director appeared to have previously given full information to the two managers of the company as to his interest in the debentures:—*Held*, that, according to the articles of association, it was contemplated that a director might have an interest in business brought by him to the company; and that, under the circumstances, this director could retain the difference between 1½ per cent. and 5 per cent. commission.—Decree of *Malins*, V.C., reversed. IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* COLEMAN - - - - 558

PROFITS OR CAPITAL—Partnership—Tenant for life and remainderman - - 503
See PARTNERSHIP ACCOUNTS.

PROMISE TO PAY—Letters written without prejudice - - - - 822
See LIMITATIONS, STATUTE OF. 4.

PROMOTERS OF COMPANY—*Agreement with—Adoption of Agreement by Company—Commencement of Business—Right of Cestui que Trust to sue.*] The Plaintiffs had incurred labour and expense in organizing a scheme for certain Exhibition Rooms, and had entered into negotiations with, and sent the plans to, some of the promoters of a certain Company, and offered to accept £2000 for remuneration. The Company was formed, and by the Articles of Agreement it was recited that the Plaintiffs had incurred labour and expense in organizing the Exhibition Rooms, and that it had been arranged with one of the promoters that he should pay them £2000 when and so soon as the Company should be in a position to commence business. And it was agreed that no expense should be incurred until 10,000 shares had been subscribed, and at least £2 a share paid thereon, and that if the Company was not in a position to carry on the undertaking before a certain day, then neither the promoters nor the officers of the Company should have any claim upon the funds of the Company. And it was provided that when the shares were subscribed for and paid upon to the amount aforesaid, the directors should pay the abovementioned promoter the sum of £2000. Copies of the Articles of Association were sent to the Plaintiffs. The shares in the Company were subscribed for and the deposits were paid, but the Company was unable to obtain a site, and never actually commenced business:—*Held*, on the evidence, that the Company had adopted the agreement as to the payment of £2000 to the Plaintiffs through the promoter:—*Held*, that the performance of the agreement was not contingent on the actual commencement of business by the Company:—*Held*, that the Plaintiffs could maintain a suit against the Company and the Directors, amongst whom was the promoter to whom the £2000 was to be paid, and were not obliged to sue in the name of the promoter.—Decree of *Stuart*, V.C., affirmed TOUCHE *v.* METROPOLITAN RAILWAY WAREHOUSING COMPANY - - - - - 671

—— Bonus to—Paid-up shares - - 469
See ACCEPTANCE OF SHARES.

PROVISIONAL SPECIFICATION—Similar invention—Second patent - - 272, 274
See SIMILAR INVENTION. 1, 2.

PUBLIC PURPOSES—Powers and duties of public body—Evidence - - - 572
See CONSERVATORS OF RIVER.

QUALIFICATION OF DIRECTORS—Paid-up shares
See ACCEPTANCE OF SHARES. [469

RAILWAY COMPANY—Restrained from taking water from river - - - 572
See CONSERVATORS OF RIVER.

—— Scheme of arrangement - - - 621
See SCHEME OF ARRANGEMENT.

RATIFICATION—Agreement with promoters of company - - - - 671
See PROMOTERS OF COMPANY.

RECEIPT IN FULL DISCHARGE—*Estoppel—Release.*] A passenger, who was injured by a railway accident, sent in a claim for £691 compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted £400, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that the Plaintiff had accepted £400 in full satisfaction and discharge of the causes of action. The Plaintiff filed his bill to restrain them from relying on the plea, and from setting up the acceptance of the £400 or the receipt as a satisfaction or discharge of the damages, except to the extent of £400. The bill did not allege fraud, but that the Plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time:—*Held* (reversing the decision of *Malins*, V.C.), that, as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity; and that the bill ought to be dismissed—*Stewart* v. *Great Western Railway Company* (2 D. J. & S. 319) distinguished. LEE *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - 527

RECONSTRUCTION OF COMPANY—*Company—Contributory — Winding-up — Dissentient Shareholder—Purchase of his Interest by Liquidator—Companies Act*, 1862, *s.* 161.] A company having resolved on a voluntary winding-up, and the reconstruction of the company, with a new capital, new articles, and a new name, a dissentient shareholder gave notice to the liquidators, under the 161st section of the *Companies Act*, 1862, requiring them to purchase his interest in the company. The liquidators accordingly took a transfer of his shares:—*Held* (reversing the decision of *Malins*, V.C.), that the liquidators had no power, under the 161st section, to release the dissentient shareholder from his liability to the creditors, but only to purchase such interest as he had in the assets of the company; and, consequently, that the shareholder's name must be put on the list of contributories. *In re* IMPERIAL LAND COMPANY OF MARSEILLES. VINING'S CASE - - 96

2. —— *Company—Sanction of Court—Jurisdiction—Companies Act*, 1862, *ss.* 95, 159, 160—*Joint Stock Companies Arrangement Act*, 1870.]

RECONSTRUCTION OF COMPANY—*continued.*

The *A. Life Assurance Company* purchased the businesses of several companies, and indemnified them against their liabilities. Some of the policy-holders of the amalgamated companies accepted the liability of the *A. Company*, and some did not. Afterwards the *A. Company* and the other companies were ordered to be wound up. A scheme of reconstruction was proposed for the sanction of the Court, under which the contributories of the *A. Company* and the other companies were to pay certain contributions; and the assets of the *A. Company*, and also the contributions when called up, were to be handed over to a new company, which was to take the business and pay the policies when they arrived at maturity with a deduction of £5 per cent. on their amounts. —The scheme had been accepted by a majority of three-fourths in value of the creditors present at meetings of each of the companies, and also by a large majority of the shareholders:—*Held*, that the Court had no jurisdiction to sanction the arrangement.—Such a scheme is not a sale within the 95th section of the *Companies Act*, 1862.—The Court has no power, under the 159th and 160th sections of the *Companies Act*, 1862, to sanction an arrangement by which a minority of creditors or contributories are bound to accept a compromise against their will.—Considering the different value of policies of the same amount on different lives, and considering that it was uncertain in what cases there had been a novation by the policy-holders of the amalgamated companies, it was not possible to estimate the amounts of the claims of the individual creditors of the respective companies, and therefore the Court could not act under the powers of the *Joint Stock Companies Arrangement Act*, 1870. *In re* Albert Life Assurance Company, and other Companies - - - - - - 381

RECTIFICATION—Award—Clerical error 22
See Mistake in Award.

REGISTRAR IN BANKRUPTCY—Delegation of power by Chief Judge - - 29
See Annulling Adjudication.

REGISTRAR OF COUNTY COURT—Suit against —Transfer of cause - - 359
See County Court Jurisdiction.

REGISTRATION—Batavian law—Marriage contract—Conflict of laws - - 64
See Lex Loci Contractus.

—— Copyright in map - - - 346
See Copyright in Map.

—— Creditors' deed—Date - - - 413
See Registration of Creditors' Deed.

—— Life insurance company - - 421
See Unregistered Life Insurance Company.

—— Middlesex Registry Act - - 678
See Middlesex Registry Act.

—— Pattern - - - - - - 418
See Copyright of Design.

REGISTRATION OF CREDITORS' DEED—*Creditors' Deed—Date—Bankruptcy Act*, 1861, *s.* 192.] *D.* assigned his property to trustees by deed registered under the *Bankruptcy Act*, 1861, by which it was provided that the property should be applied as if *D.* had been "at the date hereof" adjudged bankrupt. At the date of the deed and of its registration *R.* held a bill of exchange accepted by *D.*, which had not yet arrived at maturity. After the execution of the deed, but before its registration, *R.* accepted a bill of exchange drawn upon him by *D.*:—*Held* (affirming the decision of the County Court Judge of *Liverpool*), that *R.* had no right to set off the two bills against each other, for that the date of the deed, and not the time of registration, was to be looked to, and at the former time there was no mutual credit. *Ex parte* Ryder. *In re* Douglas 413

REGISTRATION OF CREDITORS' DEED—*cont.*

REINVESTMENT OF PURCHASE-MONEY—*Compensation under Lands Clauses Act*, 1845—*Tenant for Life and Remainderman—Permanent Improvements and Repairs—New Buildings.*] On a Petition by a tenant for life, for the reinvestment of purchase-money paid into Court under the *Lands Clauses Act*, 1845, the Court will not allow any of the fund to be applied in recouping the tenant for life what he has already expended, unless such expenditure was properly a charge on the estate, nor in any proposed repairs to the mansion-house. But the Court has jurisdiction to order the reinvestment of the fund in building or rebuilding houses on the estate, and will do so if it appears beneficial to the estate, and if the remaindermen do not object.—The order of *Bacon*, V.C., varied.—When a Petition is presented by a tenant for life for the reinvestment of purchase-money in any other kind of investment than lands, the remaindermen ought to be served. *In re* Leigh's Estate - - - - 887

RELEASE—Debts in winding-up—Past shareholder - - - - 800
See Past Members. 2.

—— Distinguished from receipt in full discharge
See Receipt in full Discharge. [527

RELIGIOUS EDUCATION—*Ward of Court—Religion of Father.*] A Roman Catholic died leaving a widow who was a Protestant, and an infant daughter, then six months old. He left no directions as to his child's religious education. The child was brought up by her mother as a Protestant till she was eight years and a half old. A suit having been instituted for the administration of the father's estate, the Court made an order that the child should be brought up in the Roman Catholic faith. The Court did not think it advisable to have an interview with the child. —*Stourton* v. *Stourton* (8 D. M. & G. 760) commented on.—Order of the Vice-Chancellor of the Duchy of *Lancaster* affirmed. Hawksworth *v.* Hawksworth - - - - - 539

REMITTER—Composition of debt—Default of payment of instalments - - 320
See Appropriation of Payments.

REMOTENESS OF DAMAGE—*Deposit for safe Custody with Bankers—Negligence—Forged Transfer—Costs in Suit to recover Certificates.*] *J.*, the owner of railway shares in two companies, deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving

REMOTENESS OF DAMAGE—*continued.*
the certificates from the railway companies, *J.* gave his address in one instance at the office of the bank, and in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of *J.* to the transfer. The companies wrote to *J.*, informing him of the transfers, and receiving, in one instance, no answer, and in another an answer in *J.'s* name forged by the manager, registered the transfer. *J.* afterwards, on discovery of the fraud, brought suits against the two companies and the transferees of the shares, in which he recovered the shares, but the Court gave him no costs. The banking company being wound up, *J.* claimed to prove against the company for the amount of his costs in the suits which had been occasioned by their negligence:—*Held* (affirming the judgment of the Master of the Rolls), that the banking company were bailees for reward of the certificates, and that they had been guilty of culpable negligence in keeping them; but *held* (reversing the order of the Master of the Rolls), that the loss of the costs was too remote a consequence of the negligence of the company for them to be held liable for it, and the claim refused. *In re* UNITED SERVICE COMPANY. JOHNSTON'S CLAIM [212

RENT—Distress—Company—Winding-up 462
See DISTRESS AFTER WINDING-UP ORDER.

RESCINDING CONTRACT—Objection to title—Minerals - - - - 91
See CONDITIONS OF SALE. 1.

RESIDUARY GIFT—*Will—Wills Act* (1 *Vict. c.* 26), *s.* 25— *Gift of "the rest of my Lands in H."*] A testatrix gave certain lands in the parish of *H.* to *A.*, *B.*, and *C.*, as joint tenants in fee, and devised to the Plaintiff "the rest of my freehold hereditaments in the parish of *H.*, and all my freehold hereditaments in the parishes of," &c. The devise to *A.*, *B.*, and *C.*, having been declared void, as made on a secret trust for a charity:—*Held* (affirming the decision of the Master of the Rolls), that the lands comprised in that devise did not pass under the gift of "the rest of my freehold hereditaments in the parish of *H.*" but were undisposed of. SPRINGETT *v.* JENNINGS 333

—— Appointment by — Defective appointment
See EXCLUSIVE APPOINTMENT. [160

RESPONDENTS TO PETITION — *Practice—Petition—Costs of Respondent's appearing.*] Where a Petitioner does not, on serving the Petition upon a Respondent who has no interest in the matter, tender him a sum sufficient to enable him to consult a solicitor as to the Petition, the Petitioner must pay the costs of the Respondent's appearing. WOOD *v.* VOUCHER - - - - 77

RETAINER OF SOLICITOR—Authority to enter appearance—Right of defendant to appear by separate solicitor - - 220
See AUTHORITY TO ENTER APPEARANCE.

REVERSION—Infant's personal estate—Sale by Court—Jurisdiction - - 850
See CONDITIONS OF SALE. 3.

—— Sale of—Usurious contract - - 665
See USURIOUS CONTRACT.

REVIVOR AND SUPPLEMENT — *Practice—Revivor for Costs*—33 & 34 *Vict. c.* 28, *s.* 19.] A decree was made in 1842, ordering the Defendants to pay the costs of the two Plaintiffs. Nothing remained to be done except taxation and payment of costs. In 1844 the solicitors of the Defendants gave to the solicitors of the Plaintiffs an undertaking to pay the costs when taxed, including some costs not payable under the decree. In 1857 the Plaintiffs died, and in 1870 the personal representative of the Plaintiff who had died first obtained an order of course to revive, the other Plaintiff having no personal representative. Vice-Chancellor *Stuart* having refused to discharge this order:—*Held*, on appeal, that the undertaking by the Defendants' solicitors to pay costs took away the right to proceed against the Defendants for them; and, apart from this, that the order had been obtained by a person not having an interest:—*Held*, further, that the statute 33 & 34 Vict. c. 28, s. 19, though retrospective as to the order for payment of costs, is only prospective as to the abatement, and does not authorize a revivor for costs where the death has occurred before the passing of the Act. DOGGETT *v.* EASTERN COUNTIES RAILWAY COMPANY - - - - 474

RIGHT OF COMMON—*Freehold Tenant suing on behalf of others—Inhabitants—Origin of Rights—Loss of Rights—Land built upon.*] The freehold tenants of a manor must have in common some rights over the waste as against the lord; and therefore one freehold tenant of a manor, claiming by prescription on a presumed grant, can sue on behalf of himself and all the other freehold tenants of the manor to protect their rights over the waste of the manor as against the lord.—Where rights of common have been exercised for many years, the Court will try to find a legal origin for those rights.—Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the Court will presume that the inhabitants claimed through the freehold tenants.—A freehold tenant of a manor does not, by ceasing to pay quit-rents, and by neglecting to claim admittance, lose his rights as against the lord.—*Quære*, as to the effect of building on the land, with respect to rights of pasture, rights of cutting turf, and of digging gravel on the waste.—Decree of the Master of the Rolls affirmed. WARRICK *v.* QUEEN'S COLLEGE, OXFORD - 716

2. —— *Practice — Misjoinder of Plaintiffs — Omission of Parties interested as Plaintiffs—Freeholders—Copyholders—Sufficient Waste.*] A bill was filed by a freehold tenant of a manor, suing on behalf of himself and all other owners of freehold tenements within the ambit or former ambit of the manor, to establish rights of common against the lord. It was proved that the Plaintiff and the other freehold tenants within the present ambit of the manor had commonable rights, and that the copyholders of the manor had also commonable rights, but it was not proved that the owners of freehold tenements within the former ambit had such rights:—*Held*, that the joining as Plaintiffs the owners of freehold tenements within the former ambit amounted merely to a misjoinder of Plaintiffs, and did not prevent the Court from making a decree upon the bill:—*Held*, that though the Plaintiff might have sued on behalf of the copy-

RIGHT OF COMMON—*continued.*
holders also, if they had rights co-extensive with those of the freeholders, he was able to maintain his bill on behalf of the freeholders alone:—*Held*, that where the lord claims a right to inclose a part of the waste, the onus of shewing that sufficient waste is left for the commoners lies upon the lord.—Decree of the Master of the Rolls affirmed. BETTS *v.* THOMPSON - - - - 732

RIPARIAN OWNERS—Railway company—Injunction against taking water - 572
See CONSERVATORS OF RIVER.

RIVER—Impeding navigation of, by taking water—Railway company - - 572
See CONSERVATORS OF RIVER.

ROMAN CATHOLIC FAITH—Education of child
See RELIGIOUS EDUCATION. [539

SALE—By Court—Infants—Reversionary personal estate—Conditions of sale - 850
See CONDITIONS OF SALE. 3.

—— Consignee—Goods on sale or return - 397
See SALE OR RETURN.

—— Fraudulent—Undervalue - - 645
See SALE AT UNDERVALUE.

—— Partition Act - - - - 685
See PARTITION SUIT.

SALE AT UNDERVALUE—*Foreclosure—Final Order—Receipt of Rents—Setting aside Deed.*] Where a solicitor and mortgagee took a conveyance from the mortgagor, a day labourer, who had no independent legal advice:—*Held*, that the deed was not valid unless the circumstances were all explained to the mortgagor, and that the onus of shewing that this was done lay on the solicitor.—A foreclosure is not complete until the final order has been made, and the final order cannot be obtained if rents have been received by the mortgagee since the account was taken.—Decree of *James*, V.C., affirmed, with a variation. PREES *v.* COKE - - - - - - 645

SALE OR RETURN—*Agency—Consignee.*] *T. & Co.* were in the habit of sending goods for sale to *N.*, who was a partner in the firm of *N. & Co.*, but received these goods on his private account. The course of dealing between *T. & Co.* and *N.* was that the goods were accompanied by a price list. *N.* sold the goods on what terms he pleased, and each month sent to *T. & Co.* an account of the goods he had sold, debiting himself with the prices named for them in the price list, and at the expiration of another month he paid the amount in cash without any regard to the prices at which he had sold the goods, or the length of credit he had given. He paid the moneys which he received from the sales into the general account of his firm, and made his payments to *T. & Co.* through his firm, with whom he kept an account of moneys paid in and drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of *T. & Co.* *N. & Co.* having executed a deed of arrangement with their creditors, *T. & Co* sought to prove against the joint estate for the amount standing to *N.*'s credit with his firm, on the ground that the same arose from moneys belonging to *T. & Co.*, and improperly placed by *N.* in the hands of his firm:—*Held* (reversing the decision of the Chief Judge) that such proof could

SALE OR RETURN—*continued*
not be admitted, for that the course of dealing shewed that although both parties might look upon the business as an agency, *N.* did not, in fact, sell the goods as agent of *T. & Co.*, but on his own account, upon the terms of his paying *T. & Co.* for them at a fixed rate if he sold them, and the moneys he received for them were therefore his own moneys, which *T. & Co.* had no right to follow. *Ex parte* WHITE. *In re* NEVILL 397

SATISFACTION—Legacy - - - 136
See ADEMPTION.

SCANDAL—Irrelevant charges of fraud—Costs 40
See CHARGE OF FRAUD.

SCHEDULE TO BILL—*Practice.*] Leave given to file a bill of complaint, with a schedule containing copies of pleadings referred to in the bill. CRÉDIT FONCIER AND MOBILIER OF ENGLAND *v.* LORD SONDES - - - - - 477

SCHEME OF ARRANGEMENT—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127)—*Debenture Holder—Judgment Creditor.*] *M.*, a debenture holder in a railway company, obtained judgment against the company for principal, interest, and costs. After this the company filed a scheme of arrangement under the *Railway Companies Act*, 1867, which was assented to by the requisite majority of the debenture holders, but not by *M.*, and was duly confirmed and inrolled. *M.* having afterwards proceeded to issue execution on his judgment, the company filed a bill to restrain him:—*Held* (affirming a decision of *Malins*, V.C.), that *M.*, although he had obtained judgment, was still a debenture holder, and therefore bound by the scheme; and must be restrained from taking proceedings under his judgment. POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY COMPANY *v.* MINOR - - - - 621

—— Joint Stock Companies Arrangement Act, 1870 - - - - - 381
See RECONSTRUCTION OF COMPANY. 2.

SCOTCH HEIR—Election - - - 302
See ELECTION, DOCTRINE OF. 2.

SCOTCH SEQUESTRATION—Shareholder—Proof of liability for calls - - 582
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See TRANSFER OF SHARES. 4. [655

SEIZURE AND SALE—Execution creditor—Liquidation by arrangement - 605
See EXECUTION CREDITOR. 1.

—— Execution creditor—Bankruptcy - 795
See EXECUTION CREDITOR. 2.

SEPARATION DEED—*Custody of Children—Specific Performance—Lawful Agreement.*] A wife intended to proceed in the Divorce Court for a separation, and had filed a bill against her husband to set aside a certain appointment. By a deed of compromise it was agreed that the proceedings should be stayed, that two of the children should remain at such schools as the husband should direct, and that their holidays should be passed at such places as the trustees should direct:—*Held*, that, although a father could not by agreement deprive himself of the control of his children, the agreement in this case as to where the holidays of the children should be passed was reasonable, and would be enforced by the Court.

SEPARATION DEED—*continued.*
—Decision of the Master of the Rolls reversed. HAMILTON *v.* HECTOR - - - 701
SERVICE—Out of the jurisdiction—Debtor summons - - - - - 406
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—— Petition for re-investment — Compensation under Lands Clauses Act—Remaindermen - - - - - 887
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SET-OFF—Winding-up—Dividends - 388
See CREDITOR HOLDING SECURITY. 1.
SETTING ASIDE DEED - - - 645
See SALE AT UNDERVALUE.
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See MARRIAGE CONTRACT.
—— Voluntary—Consideration—27 Eliz. c. 4 228
See VOLUNTARY SETTLEMENT.
—— Younger son becoming eldest son - 590
See ELDEST SON.
SHARES—Lien on—Bankers - - 818
See BANKER'S LIEN.
SIMILAR INVENTION—*Patent—Second Patent.*] Where the Law Officer has reported that part of an invention for which a patent is sought is identical with part of an invention which is the subject of an existing patent, a second patent will not, except under special circumstances, be granted for that part, although the validity of the first patent is disputed. *Ex parte* MANCEAUX - 272
2. —— *Patent—Mala fides.*] Where a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, and subsequently filed a complete specification and obtained letters patent:—*Held*, that, under the circumstances, the Great Seal might be affixed to the letters patent for the servant's invention, and that the letters patent might bear the date of his provisional specification. *Ex parte* SCOTT & YOUNG - 274
SOLICITOR—Authority to enter appearance 220
See AUTHORITY TO ENTER APPEARANCE.
—— Lien—Charge under 23 & 24 Vict. c. 127 865
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—— Notice—Communication to client - 678
See MIDDLESEX REGISTRY ACT.
—— Suit at risk of the solicitor - - 497
See SOLICITOR'S SUIT.
SOLICITOR'S LIEN—*Charge under 23 & 24 Vict. c. 127, s. 28—Practice—Jurisdiction.*] An order declaring a solicitor entitled to a charge under the 23 & 24 Vict. c. 127, s. 28, on the property recovered in a suit must be made in the branch of the Court to which the suit was attached.—The decision of *Malins*, V.C., reversed.—*Semble*, the fact that a suit has been absolutely dismissed is no objection to such an order being subsequently made in the suit. HEINRICH *v.* SUTTON. *In re* FIDDEY (A SOLICITOR) - - - - - 865
SOLICITOR'S SUIT—*Costs—Indemnity.*] Where a solicitor engages to indemnify the Plaintiff in a suit against the costs of the suit, and has the control of the suit, he will be ordered to pay to the Defendants their costs of the suit when dismissed. —Order of *James*, V.C., varied. *In re* JONES 497
SPECIFIC PERFORMANCE—Agreement for lease—Standing by and allowing building 551
See STANDING BY AND ALLOWING BUILDING.
—— Concealment of material fact - 32, 770
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—— Rescinding contract—Title to mines—Compensation - - - - 91
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—— Statute of Limitations—Adverse possession—Boundary wall - - - 428
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—— Separation deed—Illegal agreement - 701
See SEPARATION DEED.
SPECIFIC PERFORMANCE — MISDESCRIPTION—*Vendor and Purchaser—Mistake—Question of Title or Conveyance.*] On a sale of a small residential property the plan exhibited shewed the western side as bounded by a strip of ground covered with a mass of shrubs or trees. An intending purchaser went with the plan in his hand, inspected the property, found on the western side a belt of shrubs bounded on the west by an iron fence, and including three magnificent trees. He then bid for the property, believing that he was buying everything up to the fence. He afterwards discovered that the three trees and the iron fence stood on the glebe land which adjoined this property, the real boundary being denoted by stumps, which were so shrouded by the shrubs as not easily to be seen. The plan represented in a conspicuous way all the detached trees standing on the property, none of which were nearly so large as the trees in question, but did not shew these trees. It was admitted that the existence of these trees was a material element in the value of the property as a residence:—*Held* (reversing the decision of *Malins*, V.C., that the purchaser inspecting the property with the plan in his hand would naturally conclude the iron fence to be the boundary; that there was nothing to put him on inquiry whether it was not; that he had been misled by the fault of the vendors; and that specific performance could not be decreed against him:—*Per Mellish*, L.J.:—In such a case the difference between the apparent and true boundaries ought not only to have been shewn on the plan, but also mentioned in the particulars:—*Held*, further, that whether the purchaser's motive for resisting specific performance was that he objected to having the property without the trees, or that for some other totally distinct reason he wished to escape from his bargain, was a question with which the Court had no concern:—*Per James*, L.J.:—If a purchaser insists on a requisition on a matter of conveyance with which the vendor refuses to comply, and the purchaser rescinds the contract, whether, if the Court holds the purchaser to have been right in his contention, a decree will be made for specific performance at the suit of the vendor—*quære*. DENNY *v.* HANCOCK 1

SPECIFICATION OF PATENT—*Largeness of Claim—Issues—Practice.*] The usual issues may be granted in a patent suit before the hearing of the cause, although the Defendant denies the validity of the Plaintiff's patent on the ground of the generality of the claim in the specification.—Decision of *Wickens*, V.C., reversed.—Where a patentee, in his specification, professes to do by machinery what has never been done before by machinery, and describes the machinery by which he does it, his claim is not too large on the face of it, because it claims generally to perform the operation "by machinery."—A patentee in his specification described an improved ruffle or frill, and the machinery by which he proposed to make such improved ruffle, and to fasten it to a plain fabric by a single series of stitches. By his claim he claimed "the production by machinery of ruffles, and the simultaneous attachment of them to a plain fabric by a single series of stitches":—*Held*, that the claim was not, on the face of it, too large. Arnold *v.* Bradbury - - 706

STANDING BY AND ALLOWING BUILDING—*Corporation—Agreement not under Seal—Acquiescence—Specific Performance—Boundaries of Sea-beach.*] A municipal corporation passed a resolution in January, 1860, agreeing to let to the Plaintiff the flat part of the beach opposite to the Plaintiff's field, for 300 years, at a nominal rent. The Plaintiff claimed all the beach comprised between lines drawn in prolongation of the sides of his field, and he built a wall and terrace along the part so claimed. In 1864 the corporation gave the Plaintiff notice to quit, and, after much negotiation, in 1869 brought an action of ejectment against the Plaintiff, who thereupon filed the bill in this suit for specific performance:—*Held* (affirming the decision of *Stuart*, V.C.), that, though the agreement was not under seal, the corporation was bound by acquiescence, and must perform the agreement to grant a lease:—*Held* (contrary to the decision of *Stuart*, V.C.), that the boundaries of the piece of land agreed to be demised were lines drawn from the extremities of the Plaintiff's field perpendicular to the coast-line. Crook *v.* Corporation of Seaford - 551

STATUTES:

27 Eliz. c. 4—*Voluntary Conveyance* - 229
See Voluntary Settlement.

21 Jac. 1, c. 16—*Limitations* - - 822
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8 Geo. 2, c. 13—*Copyright* - - 346
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9 Geo. 4, c. 14—*Limitations* - - 822
See Limitations, Statute of. 4.

2 & 3 Will 4, c. 71, s. 3—*Prescription* 763, 809
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3 & 4 Will. 4, c. 27—*Limitations* 428, 478, 789
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1 Vict. c. 26, s. 25—*Wills* - - 333
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5 & 6 Vict. c. 45—*Copyright* - - 346
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7 & 8 Vict. c. 110—*Companies* - - 421
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8 Vict. c. 18, s. 68—*Lands Clauses Act* 887
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8 & 9 Vict. c. 70, s. 22—*Church Building* 296
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15 Vict. c. 12—*Copyright* - - 346
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16 & 17 Vict. c. 51, ss. 20, 42—*Succession Duty* [501
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17 & 18 Vict. c. 36—*Bills of Sale* - 626
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19 & 20 Vict. c. 47—*Companies* - - 421
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19 & 20 Vict. c. 108, s. 21—*County Court* 359
See County Court Jurisdiction.

20 & 21 Vict. c. 80—*Companies* - 421
See Unregistered Life Insurance Company.

21 & 22 Vict. c. 70, s. 5—*Copyright* - 418
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21 & 22 Vict. c. 98, s. 68—*Local Government* [483
See Subterranean Watercourse.

23 & 24 Vict. c. 127, s. 28—*Solicitors* - 865
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24 & 25 Vict. c. 134, s. 192 - - 413
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25 & 26 Vict. c. 89, ss. 38, 75, 77—*Companies Act* - - - - - 582
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—— —— s. 87 - - - - 643
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—— —— ss. 95, 159, 160 - - 381
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—— —— s. 115 - - - - 145
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—— —— s. 161 - - 96, 176, 614
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—— —— s. 165 - - - - 104
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28 & 29 Vict. c. 99, s. 21—*County Courts* 359
See County Court Jurisdiction.

30 & 31 Vict. c. 127, ss. 7, 9—*Railway Companies* - - - - 621
See Scheme of Arrangement.

30 & 31 Vict. c. 142, s. 8—*County Courts* 359
See County Court Jurisdiction.

31 & 32 Vict. c. 4—*Reversions* - - 665
See Usurious Contract.

31 & 32 Vict. c. 40, s. 4—*Partition* - 685
See Partition Suit.

32 & 33 Vict. c. 62, s. 4—*Debtors Act* - 152
See Committal under Debtors Act, 1869.

32 & 33 Vict. c. 71, ss. 6, 7—*Bankruptcy* [406, 875
See Debtor Summons. 1, 2.

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32 & 33 Vict. c. 71, s. 7 - - - 602
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—— —— s. 16 - - - 881
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—— —— ss. 6, 125 - - - 605
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33 & 34 Vict. c. 28, s. 19—*Solicitors* - 474
See REVIVOR AND SUPPLEMENT.

33 & 34 Vict. c. 104—*Companies Arrangement* - - - - - 381
See RECONSTRUCTION OF COMPANY. 2.

STAYING PROCEEDINGS IN BANKRUPTCY—*Bankruptcy Act*, 1869, *s.* 7—*Debtor Summons.*] In January, 1870, *K.* commenced an action against *E.* for alleged breach of contract as to a piece of ground agreed to be demised by *E.* to *K.* In July *E.* commenced ejectment against *K.*, and in December obtained judgment, with costs exceeding £50. *E.* then, in February, 1871, took out a debtor summons against *K.* for these costs. *K.* applied to stay proceedings, alleging that he should recover a larger sum in the action, and that he believed the debtor summons was taken out to prevent his proceeding with the action; and the Registrar made an order staying proceedings:—*Held*, on appeal, that the application ought to have been refused, for that the circumstances alleged did not, under the *Bankruptcy Act*, 1869, s. 7, support the application. *Ex parte* ELLIS. *In re* KAIN - - - - - - 602

SUBSCRIBER OF MEMORANDUM—*Contributory—Fully paid-up Shares.*] The memorandum of association of a company was subscribed by *A.* for 250 shares; and by the articles of association it was declared that the company should be at liberty to adopt an agreement for the purchase of certain mines from *A.* and another, who were to be paid partly by 500 fully paid-up shares. The agreement was adopted, and the vendors were entered in the register as holders of 250 fully paid-up shares each:—*Held*, that *A.* must be considered as a holder of fully paid-up shares, and not as an ordinary contributory. *In re* BOSWORTHEN AND PENZANCE MINING COMPANY. JONES' CASE - 48

SUBSCRIPTION TO CHARITY — *Lunacy.*] A lunatic was tenant for life of about seventy houses in *London*, all situate in the same neighbourhood, and producing a gross rental of £2440. His surplus income, after providing him with every comfort, was about £900 a year. Three of the houses were sold to a church building committee as a site for a church to a new district parish, and the incumbent and the church committee solicited subscriptions for building the church and parochial schools in connection with it. Leave was given to the committee of the estate, who was also heiress-at-law and sole next of kin, to contribute out of the lunatic's income £250 towards building the church, and a like sum for the schools. *In re* STRICKLAND - - - - - 226

SUBTERRANEAN WATERCOURSE — *Surface Watercourse—Local Board of Health*—21 & 22 *Vict. c.* 98, *s.* 68, *art.* 3—11 & 12 *Vict. c.* 63, *s.* 45.] Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land.—Where a local board of health are interfering with a watercourse in a manner not authorized by the *Local Government Act* (21 & 22 Vict. c. 98), s. 68, art. 3, they will be restrained from so doing, and the person injured will not be left to his remedy under the compensation clause of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), s. 144.—Decree of the Master of the Rolls reversed. GRAND JUNCTION CANAL COMPANY *v.* SHUGAR - - - - - 483

SUCCESSION DUTY—*Sale by Trustees*—16 & 17 *Vict. c.* 51, *ss.* 20, 42.] Lands charged with the payment of a jointure were conveyed to the uses of a settlement, the trustees of which had power to sell with the consent of the tenant for life. The trustees agreed to sell a part of the lands, the jointress concurring in the sale:—*Held*, that the lands would be sold free from the succession duty payable on the death of the jointress.—Decree of *James*, V.C., affirmed. DUGDALE *v.* MEADOWS 501

SURETY—Co-sureties by separate instruments
See CO-SURETIES. [342

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See LIMITED GUARANTEE.

SURFACE WATERCOURSE — Interference with
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SURPLUS ASSETS — Company — Winding-up — Mode of distribution. - 51, 53, n.
See DISTRIBUTION OF SURPLUS ASSETS. 1, 2.

SURPLUS OF CHARITY—Charity not exhausting whole income - - - 512
See CHARITY NOT EXHAUSTING THE WHOLE INCOME.

TAXATION OF COSTS—*Costs "so far as they have been increased."*] *B.*, a second mortgagee, filed his bill for redemption and foreclosure against *F.*, who held the first and third mortgages on the property. *F.*, by his answer, disputed *B.'s* security by denying the consideration, and filed a cross bill for foreclosure impeaching that security. By the decree made in both suits, *F.'s* bill was dismissed with costs, so far as it sought to set aside *B.'s* security, and *F.* was ordered to pay the costs of the first suit, "so far as the same have been increased by the answer of *F.* impeaching the validity of the security of *B.*" The Taxing Master held that the costs incurred by *B.* in proving the consideration, and consequent there-

TAXATION OF COSTS—*continued.*

on, were the increase of costs in the first suit which *F.* was to pay, and that the expense of the hearing must be apportioned according to the number of folios, and that the costs of the second suit must be apportioned, as in *Heighington* v. *Grant* (1 Beav. 228). He allowed the cost of three counsel in the second suit on account of the complexity of the case. *B.* objected to this taxation, and contended that he ought to be allowed all his costs except such as would have been incurred if the suits had been ordinary redemption and foreclosure suits heard as short causes, and that *F.* ought to have all his costs disallowed, except such as would in that case have been incurred, the difference being attributable to *F.'s* impeaching *B.'s* security:—*Held* (affirming the decision of *Malins*, V.C.), that the Taxing Master had proceeded on a correct principle:—But *held*, that so much of *B.'s* bill as was directed to anticipating the objection taken by *F.'s* answer ought to be dealt with as occasioned by the objection taken in the answer, and that in the other suit regard ought to have been had in taxation to the circumstance that the complexity which justified the allowance of three counsel was owing to *B.'s* security being impeached. Begbie *v.* Fenwick. Fenwick *v.* Begbie - - - - - - 869

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—— Custody of title deeds pending suit - 307
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TENANT IN COMMON—Sale by one tenant without objection by the other - - 770
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TIME—Amendment of bill—Cons. Ord. xxxvii., r. 18 - - - - - 833
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TITLE DEEDS—*Tenant for Life—Pending Suit—Custody of Title Deeds.*] A testator devised his real estate in strict settlement, giving to trustees a power of sale and exchange, to be exercised with the consent of the person entitled in possession, if of full age; and he bequeathed his residuary personalty to the trustees upon the trusts declared concerning the moneys to arise from sales under the power. Shortly after the death of the testator a decree was made at the suit of the first

TITLE DEEDS—*continued.*

tenant for life, then an infant, for the execution of the trusts of the will. Parts of the estate were sold under the power and the money paid into Court, and a large fund was there applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, and as to the propriety of applying to Parliament for a private estate Act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the Court, that the trustees might be ordered to deliver to her the title deeds of the estates, subject to the limitations of the will, which application was refused by *Stuart*, V.C.:—*Held*, that, as a suit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit; and that the Court of Appeal would not interfere with the discretion of the Vice-Chancellor on the subject. Stanford *v.* Roberts - - 307

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TRANSFER OF CAUSE—County Court—Suit against Registrar - - - 359
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TRANSFER OF SHARES—*Contributory—Purchase in name of a Trustee—Intention to escape Liability—Unregistered Company—Cost-book System—Companies Act*, 1862, *s.* 200.] *K.*, the secretary of an unregistered company carried on upon the cost-book system, purchased shares in the company, and had them transferred to a nominee, who was a man of small means, his object being to prevent its being generally known that he was trafficking in shares in the company. The transfer was registered, and about three years afterwards the company was wound up by an order of the Court of Stannaries:—*Held* (reversing the decision of the Vice-Warden of the Stannaries Court), that the transaction was a *bonâ fide* purchase of shares in the name of a trustee, and that *K* could not be put on the list of contributories in respect of them.—*Semble*, that even if *K.* had purchased the shares in the name of a nominee for the purpose of escaping liability, yet as *K.* was never under any obligation to the company in respect of those shares, he could not be made a contributory.—*Cox's Case* (33 L. J. (Ch.) 145) distinguished. *In re* Great Wheal Busy Mining Company. King's Case - - - - - - 196

2. —— *Company—Directors—Execution of Deed—Registration—Certificate—Duty of Directors—Lapse of Time—Value of Goodwill.*] A company had incurred considerable losses, and unless credit was taken for the value of the goodwill, so much of the capital had been lost that the directors ought, according to the deed of settlement, to have dissolved the company. Reference was made to an accountant, whose report shewed

TRANSFER OF SHARES—*continued.*

heavy losses, and recommended a change. Meetings of the company were held, at which the accounts of the company were shewn; but this report was not mentioned to the shareholders. The existing directors all transferred their shares to other persons, who became directors. One of the existing directors agreed to transfer his shares to one of the new directors, payment being postponed, and to some extent contingent. A deed of transfer was executed by both. The transfer was entered on the register of transfers of the company and returned to the Joint Stock Companies Registry Office. The transferee did not execute a deed of covenant as required by the deed of settlement. By that deed the approval by the directors of a transferee was required, and a certificate of such approval was to be given. No certificate could be found, but there was evidence that such a certificate had been given, but that it was not signed at a meeting, and that two of the directors who signed it were interested in the transfer. A meeting of the company was held on the day of the transfer, and another a year afterwards. A year after that the company was wound up:—*Held*, that, under the circumstances, the transfer was made *bonâ fide*, and that the transferor was not a contributory:—That the non-production of the report was not a ground for impeaching the transaction for fraud:—That a director, though interested in it, was competent to approve of a transfer:—That it was the duty of the directors to compel execution of a deed of covenant by the transferee, and that the transferee could not be affected by their neglect, though both he and the transferor were directors:—That the shareholders must have been aware of the transfer, and might have objected at the meetings if they did object; and that the irregularities of the transfer could not be taken advantage of after the lapse of several years.—Order of the Master of the Rolls reversed. *In re* AGRICULTURIST CATTLE INSURANCE COMPANY. BUSH'S CASE - - - - - 246

3. —— *Company — Bargain by Directors — Conditional Assent to Transfer—Guarantee for Payment of Calls.*] *H.*, a shareholder in a company, being desirous of getting rid of his shares, transferred them out and out for a nominal consideration to his clerk. The directors, who had power to refuse to register transfers, declined to register the transfer unless *H.* guaranteed the payment of a call which they were about to make, and also (as they contended) all future calls. *H.* accordingly gave the guarantee, and the transfer was passed and the transferee registered as a shareholder. *H.* paid the call when made, and the company was afterwards wound up:—*Held*, that the bargain with the directors was good, and the transfer valid; and that, even on the assumption that *H.* had guaranteed all future calls, he was not liable to be placed on the list as a contributory.—Decision of *Stuart*, V.C., reversed. *In re* BANK OF HINDUSTAN, CHINA, AND JAPAN. HARRISON'S CASE - - - - - 286

4. ——*Company—Scrip Certificates transferable to Bearer—Vesting of Shares.*] The Plaintiff applied for shares in a joint stock company subject to the *Companies Clauses Act*, 1845, which were accordingly allotted to him, and he paid the allotment money, and his name was entered on the register of shareholders. After the allotment, the company sent him scrip certificates, transferable by delivery, with a statement that the allottee or bearer would be entitled to exchange them for share certificates. The Plaintiff sold his right to the shares to a purchaser, and delivered him the scrip certificates, but executed no transfer of the shares. The purchaser gave notice to the company of the sale, and paid some calls on the shares. The company afterwards made other calls, and demanded payment from the Plaintiff, and ultimately brought an action against him for them. The Plaintiff filed his bill to restrain the action:—*Held* (reversing the decision of *Stuart*, V.C.), that the shares did not pass by the delivery of the scrip certificates, and that the Plaintiff was not discharged from his liability as a shareholder.—By the private Act of a joint stock company, it was provided that it should not be lawful for the company to issue any share, nor should any share vest in the person accepting the same until one-fifth of the amount of the share had been paid up:—*Held*, that, notwithstanding this proviso, a shareholder who had not paid one-fifth of the amount of the shares which had been allotted to him, was liable for payment of calls.—*East Gloucestershire Railway Company* v. *Bartholomew* (Law Rep. 3 Ex. 15) followed. MCEUEN *v.* WEST LONDON WHARVES AND WAREHOUSES COMPANY 665

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UNREGISTERED LIFE INSURANCE COMPANY—*Winding-up—Joint Stock Companies Acts*, 1844, 1856—*Joint Stock Companies Act Amendment Act*, 1857—*Companies Act*, 1862, *s.* 199.] The effect of the *Joint Stock Companies Act Amendment Act*, 1857 (20 & 21 Vict. c. 80), was to leave the *Joint Stock Companies Act*, 1844 (7 & 8 Vict. c. 110), repealed as to insurance companies formed in the interval between the passing of the *Joint Stock Companies Act*, 1856 (19 & 20 Vict. c. 47), and the passing of the Act of 1857; and therefore such companies were not required to be registered; and they may be wound up as unregistered companies under the *Companies Act*, 1862. *In re* Bank of London and National Provincial Insurance Association - - - 421

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USURIOUS CONTRACT—*Unconscionable Bargain—Money-lender—Reversion—Security—Infant—Advantage taken of Youth and Inexperience.*] The protection which the Court of Chancery throws round unwary young men in the hands of unscrupulous persons is not affected by the repeal of the usury laws, or by the change of the law as to the sale of reversions.—One brother, who was under age, accepted a bill, which was discounted by a money-lender, and the proceeds were paid to another person. He afterwards applied to the money-lender for further advances, on acceptances by an elder brother, who was then in his twenty-sixth year: the money-lender required the sum due on the former bill to be included in the bill to be accepted by the elder brother. This was agreed to, and bills were accepted by the elder brother for an amount including the sum due on the first bill, and interest, a further sum advanced, and a considerable sum for discount. Further sums were afterwards advanced by the money-lender on similar securities, at considerable discounts, part of the proceeds being received by the elder brother, part by the younger brother; and the elder brother gave charges for all the sums due on the bills upon a reversion to which he was entitled on the death of his mother:—*Held*, that the charges so given must stand as security for the sums actually advanced only, with interest at 5 per cent.—Decree of *Stuart*, V.C., affirmed. Tyler *v.* Yates - - - - 665

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—— Younger sons—Class when ascertained 590
See Eldest Son.

VOLUNTARY SETTLEMENT—27 *Eliz. c.* 4—*Consideration.*] The owner of a freehold estate, which was worth, beyond a mortgage to which it was subject, about £1300, was persuaded by *K.*, a relative of his wife, to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, *K* agreed to advance him £150 on his promissory note to meet the interest on the mortgage, which was then in arrear. The settlement was accordingly prepared and executed, but no mention was made in it of the advance of £150:—*Held*, on a bill filed by a subsequent mortgagee to establish priority over the settlement, that the advance of the £150 was a sufficient valuable consideration to support the settlement under 27 Eliz. c. 4.—The decision of *James*, V.C., affirmed. Bayspoole *v.* Collins - 228

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—— Life insurance company—Transfer of business - - - - 362, 374, 393
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WINDING-UP PETITION—*Winding-up—Limited Company—Smallness of Interest of Petitioner—Shareholder — Companies Act*, 1862, *s.* 79.] A company was formed, with limited liability, having a capital of £50,000, in 10,000 shares, of which 2300 were taken, and calls made to the amount of £4 per share. A holder of five shares, on which £4 per share had been paid, presented a Petition for winding up the company, alleging it to be unable to pay its debts. The great body of shareholders were opposed to a winding-up :—*Held* (affirming the order of *Malins*, V.C.), that the Petition ought to be dismissed, for that the Court had a judicial discretion as to ordering a winding-up on the Petition of a shareholder, and ought not, in the case of a limited company, to make the order against the wish of the bulk of the shareholders on the application of a person whose interest and liability were so small. *In re* London Suburban Bank - - - 641

2. —— *Benefit Building Society—Practice—Amendment of Petition at Hearing of Appeal.*] Order made for winding up a benefit building society on the application of a member who had given notice of withdrawal of his deposits.—Amendment of Petition at hearing of appeal.—Order of the Master of the Rolls affirmed on amended petition. *In re* Queen's Benefit Building Society - - - - - 815

3. —— *Benefit Building Society—Locus standi of Petitioners — Advanced Members — Release of Petitioners' Debt — Insolvency of Company.*] A Petition was presented by four members of a permanent benefit building society, formed under 6 & 7 Will. 4, c. 32, whose shares had been advanced on mortgage, for winding up the society. One of the rules of the society gave the trustees powers to borrow any money that might be necessary for the purposes of the society, under which considerable sums of money had been borrowed on deposit, and some of the depositors pressed for their money, which the society were unable to pay without calling on their members. The committee of the society had accordingly proposed that the business should be transferred to another company and the society wound up, to which the great majority of the shareholders had agreed. After the Petition was presented, the creditors of the society executed a release to the Petitioners from their debts, and the committee offered to effect a transfer of their mortgages :—*Held*, on appeal (reversing the de-

WINDING-UP PETITION—*continued.*

cision of *Wickens*, V.C.), that, as the release of the Petitioners operated as a release to the whole society, the Petitioners were under no direct or indirect liability in respect of the existing debts; that the society being one of unlimited liability, and the rule as to borrowing *ultrà vires*, the insolvency was not proved; and that the interest which the Petitioners had in the profits, as advanced members, was not sufficient to induce the Court to make a winding-up order contrary to the wishes of the great majority of the other members. The Petition was therefore dismissed, but without costs. Though a creditor is entitled to a winding-up order against an insolvent company *ex debito justitiæ*, this is not so as to a contributory. *In re* Professional, Commercial, and Industrial Benefit Building Society - - - 856

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WITNESS IN WINDING-UP — *Summons under Companies Act*, 1862, *s.* 115.] The *C. Company*, which was being wound up by the Court, was a judgment creditor of the *T. Railway Company*, and the official liquidator sued out an elegit under the judgment. Afterwards the *G.* and *M. Railway Companies* entered into an arrangement with the *T. Company* to run over the *T.* line; but this

WITNESS IN WINDING-UP—*continued.*

arrangement brought no profit to the *T. Company* or their creditors. The official liquidator of the *C. Company* then promoted a bill in Parliament to oblige the *G.* and *M. Railway Companies* to take a transfer of the *T. Railway* and pay off its liabilities. To assist in this object he applied for a summons to examine the shareholders of the *T. Company*, for the purpose of proving that they were nominees of the *G.* and *M. Companies*.—The Court allowed the summons to issue, without prejudice to any objections which the witnesses might take. *In re* Contract Corporation - 145

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—— "Rest of my lands at *H.*" - - 333
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